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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

APPENDICES

The Anti-Racketeering Act,
The Indictment,
Argument of Prosecutor,
Charge of Trial Court,
Refused Instructions,
Opinion of Circuit Court.

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This is submitted together with our brief in support of a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

THE STATUTE.

(The Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, United States Code, Title 18, Section 420a (a) (b) (d), commonly known as the Anti-Racketeering Act.)

Interference with Trade and Commerce by Violence, Threats, Etc.; Penalties.

(420a) Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce —

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts, shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both. (June 18, 1934, ch. 569, sec. 2, 48 Stat. 979.)

420b. **Same; definitions.**

(a) As used in section 420a of this title the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used in section 420a of this title shall not be deemed to include wages paid by a bona fide employer to a bona fide employee.

(c) The term "trade or commerce" as used in section 420a of this title, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction. (June 18, 1934, Ch. 569, sec. 1, 3, 48 Stat. 979, 980.)

420c. **Same; prosecutions.**

Prosecutions under sections 420a-420e of this title shall be commenced only upon the express direction of the Attorney General of the United States. (June 18, 1934, Ch. 569, sec. 4, 48 Stat. 980.)

420d. **Same; jurisdiction of offenses.**

Any person charged with violating section 420a of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided*, That no court of the United States shall construe or apply any of the provisions of sections 420a-420e of this title in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legiti-

mate objects thereof, as such rights are expressed in existing statutes of the United States. (June 18, 1934, ch. 569, Sec. 6, 48 Stat. 980.)

420e. **Same; separability clause.**

If any provisions of sections 420a-420d of this title or the application thereof to any person or circumstance is held invalid, the remainder of said sections and the application of such provision to other persons or circumstances shall not be affected thereby. (June 18, 1934, ch. 569, Sec. 5, 48 Stat. 980.)

THE INDICTMENT.

In the District Court of the United States
For the Southern District of New York

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oaths present:

That heretofore, to wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the date of the filing of this indictment, in the Southern District of New York and within the jurisdiction of this Court, Frank Nitto, alias Frank Nitti, Louis Compagna, alias Louis Cook, alias Lefty Louie, alias Little New York, Paul de Lucia, alias Paul Ricca, Phil D'Andrea, Francis Maritote, alias Frank Diamond, Charles Gioe, alias Charlie Joy, Ralph Pierce, John Rosselli, and Louis Kaufman, hereinafter referred to as the defendants, together with George E. Browne, William Bioff, alias Willie Bioff, and Nick Circella, alias Nick Dean, not indicted herein but hereinafter referred to as the confederates, and divers other persons to the Grand Jurors unknown, in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of

money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations, including Loew's Inc., Paramount Pictures, Inc., Twentieth Century-Fox-Film Company, Warner Bros. Pictures, Inc., and other firms, persons and corporations whose names are to the Grand Jurors unknown, all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said valuable considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear.

That this prosecution has been commenced upon the express direction of the Attorney General of the United States.

That said Browne and Bioff, confederates herein, during the period hereinabove set forth, were and are connected with a labor union, to wit, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, hereinafter called the IATSE, in the capacity of president and personal representative of the president, respectively.

That Circella, confederate herein, and said Kaufman, defendant herein, during the period hereinabove set forth, were and are connected with a labor union, to wit, the IATSE, in the capacity of international representative of the IATSE, and business agent of Local 244, affiliated with the IATSE, respectively.

That during the period hereinabove set forth, the victims were and are engaged in trade and commerce between States and with foreign nations, in the District of Columbia and in territories of the United States, that is

to say, said victims are in the motion picture business engaged in world-wide and nationwide, foreign and interstate trade and commerce, in the production, distribution and exhibition of motion pictures, directly and indirectly through subsidiary corporations and various agents and contractors.

That it was a part of said conspiracy that Frank Nitto, Louis Compagna, Paul De Lucia, Phil D'Andrea, Francis Maritote, Charles Gioe, Ralph Pierce, and John Rosselli, defendants herein, together with divers other persons to the Grand Jurors unknown, would dominate, control and direct the operations of said labor union, to wit, the IATSE.

That it was further a part of said conspiracy that said defendants and said confederates, during the period hereinabove set forth, would obtain and attempt to obtain, by the use of and attempt to use and threat to use force, violence and coercion, the payments of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, and would obtain the property of the aforesaid victims, with the consent of the aforesaid victims, induced by wrongful use of force and fear, that is to say, by demanding that said victims pay over to said defendants and said confederates the aforesaid sums of money and other valuable considerations for protection, viz., to prevent and dissuade said defendants and said confederates from restraining, impeding and obstructing the production, interstate distribution and exhibition of motion pictures of the aforesaid victims throughout the United States and otherwise injuring and destroying and attempting to injure and destroy the business of said victims.

That it was further a part of said conspiracy that said defendants and said confederates, by use of the position and power, influence and control of said defendants and said confederates and each of them in and over said IATSE, would obtain and extort money and other valuable considerations, in the amount and by the manner and means heretofore set forth from said victims for the said defendants' and said confederates' own use and benefit; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 2 (a) (b) (d) of the Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, United States Code, Title 18, Section 420a (a) (b) (d), commonly known as the Anti-Racketeering Act).

SUMMATION FOR THE GOVERNMENT.

EXCERPTS SHOWING PORTIONS OF ARGUMENT OF PROSECUTOR MADE TO THE JURY AFTER THE CLOSE OF ALL EVIDENCE, OF WHICH WE COMPLAIN.

(We have interspersed our comments here in bold face type.)

* * * Now with respect to the facts of this case I wish to stress that you can use the evidence of what the witness says and you can also use the evidence of how a man testifies. Because very frequently how he testifies is even more important than what the witness happens to say. In this connection I would like to call your attention specifically to the manner in which Goverment's witnesses from Chicago and from Newark testified. They took the stand and after being sworn they took their left hand and put it in the right hand so their hands wouldn't shake. I wonder if you remember that.

Mr. Murray: Your Honor, I object to that. I object to it because there is no such evidence. Much as I dislike to interrupt Mr. Kostelanetz I do not think it is fair comment.

Mr. Kostelanetz: I would like to suggest, if your Honor please—

The Court: Let us go on with that, please.

Mr. Simandl: I would like to record my objection to that, if the Court please.

The Court: Yes.

Mr. Simandl: I think it is unfair.

The Court: Unless the jury observed it, it will be disregarded.

R. 3619. The remark of the court made matters worse by implying that if the jury did see it, it should not be

disregarded. (See Quercia v. United States, 289 U. S. 466, 471.) The prosecutor referred to McLane (R. 2320). His demeanor should have had nothing to do with the case because his credibility was not in issue. Nothing was proved by him.

There was one witness whom the defendants could have called who was literally lurking behind the door, that door over there (indicating). You heard the testimony of Smith as to what Gioe said to him, "We are taking care of Nick Circella, we are taking care of his family, too." There was the man who was lurking behind the door and the defense could have called him. I couldn't have called him if the defense are paying for his family and support as well as then vouch for his credibility, too.

R. 3623. Circella had been convicted with Bioff and Browne. He was present in court but did not testify. Your Honors know that the prosecutor misrepresented his reasons for not calling Circella. He had no right to argue that the defense was obliged to call Circella.

The prosecutor has no right to cast the burden of proof upon the defense and to argue their failure to call witnesses such as Zwillman and Lepke, notorious characters not shown to have any knowledge of the case, or any connection with the defense, although they were put in the case by innuendo of the prosecutor.

Let us take the witness Hochstein, also known as Whiteman—the testimony about Mr. Miller and the renting agency. Where are the hoodlums who attended the 1934 convention, the six friends or so? They could have been called to give you some light. Where is D'Andrea's lawyer who went to see Emory? Where is Mr. Korshak?

Summation by Government.

You remember with respect to Barger he went and showed you how he tried to subpoena Barger and couldn't get him. There is a method of showing that a witness is not available to you, and we have had no explanations with respect to those. Even with respect to Kaufman. You recall the testimony of Jacocks as to who it was put the gun on the table. Where is that comrade in arms and why wasn't he produced before you? And where are Zwillman and Lepke? They are not around here.

Mr. Wegman: I think that is highly objectionable, your Honor. I submit that is a grossly unfair argument and ought not to be made.

Mr. Kostelanetz: I think the United States——

The Court: Just a moment. I think much of this summation upon the subject of calling witnesses is entirely immaterial to the matter anyway and that goes for both sides.

R. 3624. The Court failed to perceive that the burden was on the government. The Court here destroyed a legitimate argument made by the defense and put the defense attorneys in the same category as the prosecutor who was charged with the burden of proof. The defense had a right to argue the fact that the government failed to call witnesses shown to be in its control. It is unfair for the prosecutor to usurp this right and apply it to witnesses not shown to be connected with the defendant by anything stronger than the argument of the prosecutor.

Mr. Kostelanetz: * * * I can assure you ladies and gentlemen that if we had been able to show what the defendants did with the money, Mr. Murray would be

on his feet, and properly so, objecting that we are trying to try an income tax case instead of an extortion case. The issue here is not what the defendants did with the money. They could have given it to the Salvation Army. It is the way that the defendant got it that is the important thing.

R. 3624. This is an unfair argument. It would have been proper to show what DeLucia did with the hundreds of thousands of dollars in order to corroborate Bioff. We can't complain here of the lack of logic, but the defendants did have a right to be protected against misrepresentation on the part of the prosecutor. The fact that defense counsel would object was not the reason that the evidence was not offered. The evidence was not produced because the government did not possess it.

While at this point there was no duty on the Government to check Roach's story in any way, in the interest of truth and in the interest of bringing the facts to you as best we could find them, before the trial concluded the F.B.I. immediately went on the job to locate Mrs. Lawerenz and see what she could testify to and bring that to you.

Roach was shown to have been a perjurer and the jury had a right to believe that the slightest check up would have disclosed his purpose to perjure himself before trial, if the prosecutor did not in fact know that Roach was inventing his story.

Now, somehow, the defendants got wind of the fact that the F.B.I. was checking to find Betty Lawerenz and that we did not accept the explanation given by the witness Kugel that Betty Lawerenz was in South America. That brought the conference——

Mr. Wegman: I object to that point. Mr. Kostelanetz says that we got wind that the F.B.I. was checking it. Mr. Kostelanetz knows that we were out looking for Betty Lawerenz and that the F.B.I. was covering the trial after us. That is a grossly unfair statement. The implication is miserable and it is uncalled for, and he should not make that sort of statement.

The Court: The question is, isn't it a matter of evidence.

Mr. Wegman: The matter of evidence is the record that was made before your Honor. He says that when Roach was called these matters we knew all about. That is not the fact. He knows how we dug them up over that weekend, and he knows all about it. I think the implication is dastardly. Didn't we plead with your Honor not to let Roach go on the stand?

The Court: The matter of evidence of what was done by both sides I think was read into the record by Mr. Eben. I think Mr. Kostelanetz is making a fair comment upon what is in the record.

Mr. Wegman: I respectfully except.

Mr. Kostelanetz: A conference was brought about in the Judge's chambers. That conference immediately preceded my reading into the record a prepared statement, not of what the Government conceded would be the truth in the case but what the Government had found out since Roach last testified as to what Betty Lawerenz would testify to if she were called, and what the record of the Arlington Hotel would show and what the record of the Medinah Club would show.

Now with respect to Roach's testimony, I think you can come to at least two conclusions, and here I tell you now I am not talking about facts. I am talking about

inferences which you can draw from this whole Roach episode.

First I would like you to observe that Roach testified not only against Kaufman but the defendant Compagna, the defendant Diamond, the defendant Gioe, and in effect Roach also testified against Longy Zwillman, and necessarily the testimony was of a nature which would normally incur the enmity, the wrath of Longy Zwillman. People in their right senses do not go around incurring the wrath of an underworld character.

Here the prosecutor argues that the testimony of Roach must be true because these defendants are underworld characters.

Mr. Wegman: Objected to.

The Court: There is no testimony that he is an underworld character.

Mr. Kostelanetz: Very well. There is testimony in the record, ladies and gentlemen, that Zwillman was a man with respect to whom Lepke had some relations sufficient to tell Zwillman who should vote for Browne.

Mr. Wegman: There is no proof that Lepke ever told that to Zwillman.

The Court: There is no proof that he told him anything, but there is proof of an association, some proof. The jury may consider the evidence upon that subject. Go ahead.

The prosecutor was not talking about association. He was claiming something about a conversation when there was absolutely no proof of it.

Mr. Kostelanetz: Now, ladies and gentlemen, I say this: Mr. Murray in his summation has described Lepke

for you. He said you can refer to the newspapers and you know from the newspapers who Lepke is. Now I say to you that no man in his right senses would testify—would give perjurious testimony against an associate of Lepke, unless that man were telling the truth. On the other hand, if you are determined that Roach was not telling the truth, and I think the evidence strongly indicates that way——

The Court: I am going to charge the jury that they must entirely disregard his testimony, Mr. Roach's testimony.

Mr. Kostelanetz: Very well, if that is the case, I won't ask you to draw the inference of why Roach possibly testified the way he did testify, but I think that inference can be drawn by you. But on his Honor's instructions there is no necessity for that.

R. 3627, 3629. This announcement by the Court, if at all proper, should have been made before the arguments or during the defense argument.

Now finally there is the statute of limitations defense. That is a rather technical defense, but still a defense, and if it exists you have to give recognition to it. The statute of limitations defense can be summarized like this: the criminal says, "Yes, I committed the crime all right, but you have caught me too late." However, I do not think you have to worry about the statute of limitations defense at all. The Court will charge you what the law is on the subject, and factually these defendants never stopped working on March 18, 1940, or whatever date it was, not by a long shot. * * *

R. 3632. It is fair to infer that the prosecutor drew these instructions or knew what they were to be. There

can be no doubt now from the record that the jury would not "have to worry about the statute of limitations defense at all." The instructions destroyed the defense.

We think Willie Bioff is a vicious and evil character. We have not only thought that so, but we did something about it, we put him in jail. I had the honor of being associated with Mr. Correa at the time when we prosecuted Willie Bioff, and that landed him in jail. The Government of the United States is definitely not holding out Willie Bioff to you as any example of virtue. We know he is a gangster. We also know that he was associated with gangsters, and when you get into a den of racketeers who plot against decent people like you, you can only get evidence against racketeers when the racketeers fall out among themselves.

Why, I have never known of any decent people who would sit down with racketeers and plot. People like yourselves, like myself, would be afraid to go near racketeers.

I can assure you that the prosecution has made no promises whatsoever to Willie Bioff with respect to his sentence.

R. 3635. Even if this had been true, still the prosecutor had no right to testify.

Among lawyers it is a general standard of good manners not to call your opponent to the stand unless it is absolutely necessary. So I had a former assistant of mine, now a lieutenant in the Army, Lieutenant Paul McDonald, I had him come into the courtroom and be identified. They could have called for McDonald.

The supposed good manners of the defense prevented

them from calling the prosecutor, so he proceeded to testify without being called, and without being sworn or subjected to cross-examination. What could the defense want with McDonald?

The chronological survey of the series of events of this conspiracy indicates that this story originally started with the activities of a Chicago hoodlum named William Bioff. You have heard about his early life, how during the years 1920 to 1930 he worked in gambling houses for Rio, for Circella, and for the defendant Phil D'Andrea; how during this time he was convicted for pandering, and how the syndicate with which he was connected sent him a lawyer to represent him, and according to Bioff he never learned of the affirmance of his conviction in that case until many years later. This small time subordinate of Rio, of Circella, and of Phil D'Andrea, was in 1932 working at his trade, which was racketeering in the chicken business in Chicago. * * *

R. 3637. This is a plain insinuation that D'Andrea had something to do with a business which would give rise to a pandering charge against Bioff. The defendants were not shown to have been connected with Bioff in whatever he did in the chicken business in his early years. If it was a racket the defendants were not on trial for the crime.

You will notice that Rio for some reason not explained, seems to have disappeared from the scene at this early talk in 1934, and then reappears at the June, 1936 convention of the IATSE.

R. 3638. Upon the day of judgment the prosecutor told the court that at this time Rio was absent from Chicago

because of an indictment (R. 3807). No doubt the prosecutor was trying his best to insinuate some such prejudicial matter here in his argument.

Mr. Kostelanetz: You will recall the identification of Bioff in Sidney Kent's statement to Austin Keough, that Bioff was a member of the Capone gang, and that they were desperate men.

This is based upon a conversation by Keough with Kent who was dead at the time of the trial (R. 1812, Vol. II). The conversation took place a year after the Chicago strike. No one but Kent and Keough was present. It was the rankest hearsay. The entire record shows that the victims did not even know that Bioff had any associates outside of the union. This hearsay is made use of over and over by the prosecutor for the purpose shown here. The Court refused to strike it because the Court believed that it was proper as a state of mind.

There were meetings at his house and they were attended by the leaders, by DeLucia, by Compagna, the defendants here, by Rio, by Nitti, by Bioff, Browne, Circella, and as well by Lepke Buchalter on one occasion;

Capone, is well known, and it was proved, was in the penitentiary at the time of some social gatherings in his house. These gatherings had no place in the record, they were not meetings in the sense implied, nothing germane here was even mentioned, nor did the use of his house by his wife furnish evidence of the implication of Capone.

and the text of these two first meetings at the Hochstein house in Riverside was this: first, that there was a million or two millions to be made; that the boys wanted Browne's loyalty; that they had connections in different parts of the country, and that these connections had said they

would contact and see that Browne would win. * * * And in addition certain members of this mob were delegated to the convention to make sure that everything goes right, and that is where our friend Frank Diamond makes his first appearance. The proof of what happened at the convention is not thoroughly forthcoming unless you examine each and every one of the eight hundred men who appeared at the convention and assume that they would all tell the truth.

R. 3639. Some of those who attended the convention appeared as witnesses in the case. There was no truth to the position taken by the prosecutor and this was unfair practice. The prosecutor failed to prove an important link in his chain for the simple reason that it was not founded on fact. Then he resorts to this practice to explain his failure of proof.

And the defendants' witness, Sherman, testified to another incident at that convention, that among other things Lepke Buchalter took $2,000 from him to go to the convention as his bodyguard, and the Judge asked Sherman, "Why did you need a bodyguard?" And Sherman said, "My life had been threatened." There was some cross-examination, and it seems the guilty flyeth where no man pursues, because nobody asked him who threatened his life. Was it Compagna, DeLucia, was it Diamond? No, he said the party who threatened him was Tom Malloy, if you can believe it.

R. 3640. The only evidence in the record as to who threatened Sherman was given by Sherman. It does not make any difference whether the jury believed Sherman or not on this point. Sherman had tried to secure the support of the Chicago Local for an office in the union. The

fact that he took a man named Buchalter to the convention should not have been used against any defendant in the case.

* * * Sherman, a member of the IATSE, a politician in the IATSE, he knew with whom he was dealing, and he went to Lepke and paid him a fee.

R. 3640. How could anything done by Sherman be regarded as evidence against any defendant here? What difference should it make what Sherman knew or thought? This is but a sample of what the prosecutor, in all earnestness with the dignity and weight of his powerful office, called upon the jury to regard as evidence.

Regarding this unanimous vote in 1934 and the fact that there was no opposition, suppose you were a delegate to that convention and you saw the hall policed by Circella, by Bioff, by Frank Diamond, by Lepke Buchalter, whose job it was to get Browne elected, would that have any effect on your independent judgment, particularly when there was nobody running against Browne?

R. 3640. There was no evidence that the persons named were policing the hall, and no evidence from which any such inference can be drawn, and there was no evidence that the job of Lepke Buchalter was to get Browne elected. There is no evidence that anyone else wanted to run, or that any delegate was improperly influenced by any one.

There was always the fear that trouble with the IA in a theatre would close the places where production of films is carried on.

In addition, theatres are particularly susceptible to acts of vandalism, and you know that I think fairly well

from the testimony, that they can be committed under the cover of darkness. Theatres are dark inside and hoodlums just cannot be detected. Stench bombs have been used in theatres. Other types of bombs have been placed in theatres, including one with a 4,000 seating capacity in the City of New York. A bomb was found under the roof. Expensive booth equipment has been spoiled by some judicious wrecking.

Coston testified that men were killed in Chicago in 1931 during the strike there; that fronts of theatres were blown out, and all types of damage done.

The managers of ordinary types of enterprises can protect themselves from acts of vandalism and violence by simply locking their doors and just admitting certain people, but in the case of the theatre, the theatre owner has to keep his doors open all the time. Anybody paying an admission fee can walk in and do pretty much anything he wants under cover of darkness and get away; and then the theatre owners must always be conscious of the fact that he is dealing with the public, young and old, and that damage to the theatre property in most instances means injury to the public which comes to the theatre. So there is no wonder that theatre owners or theatres, are vulnerable to strikes and even to threats of strike.

R. 3642. Is there any doubt in the mind of your Honors that the prosecutor tried the defendants for causing strikes and that he used the hearsay evidence in an appeal to prejudice and passion?

With regard to the question of whether there should be one man in a booth or two men in a booth, I am not going to take sides on it except to say that I have been to Chicago in the course of the investigation of this case,

and the motion picture theatres apparently operate there just like they operate here.

R. 3643. The prosecutor was not sworn here and had no right to testify as he did.

Tommy Malloy, the business agent of the operators' union, was assassinated in February, 1935. Rio died a couple of weeks later, and Bioff talked to Circella and to Nitti and to Rio just before Rio's death; and the substance of the conference was to threaten to put two men back in the booths of the major circuit theatres in Chicago, and that this threat would result in some money coming up. It is undisputed, it is unchallenged in the record, that the origin of this thing came from the mob.

R. 3644. The record shows that Malloy made money out of the abuse of his power as a union official in Chicago. The defendants were not shown to have any connection with Malloy.

Regardless of the defendants' contention, the evidence, which is the only thing you have to go on—the evidence in this case shows that the demand for the money came from Bioff. This is the fact, not conjecture, and that the payment was not voluntary, as the defendants would want you to believe. If the thing was voluntary I am sure that the defendants would have called witnesses to the stand the same way that the Government has called them to prove it.

R. 3648. The indictment (R. 5) charges that the money was obtained with the consent of the victims. This may have been a reference to the failure of the defendants to testify. All those concerned in the payments, Bioff, Browne and the victims did testify. Whom did the prosecutor mean, if not the defendants?

Summation by Government.

Now I would like to digress for a minute and go to Louis Kaufman's case. We are still on local situations. We have shown you so far that the stem of this conspiracy was a certain mob in Chicago together with certain officers of the IATSE whose power could be used to take money from the motion picture industry. The background again for Kaufman's role is testimony of Bioff and Browne that there was an underworld empire with connections all over the country and that contacts of the various units would produce the election of Browne. * * *

Now, the contact in the Newark area for this group out in Chicago was Longie Zwillman.

Mr. Wegman: Your Honor, I do not like to object. I would be very glad to wait until Mr. Kostelanetz finishes his argument to put this objection on the record but I am mindful of your Honor's admonition that you wanted us to object at the time so that it would be fresh in mind, and that is, there is no proof whatever in this case that there was any underworld character. There is not any proof. There is only the hearsay of Bioff. There is not any proof that these alleged persons in Chicago at this meeting ever communicated with Zwillman in any way or that Zwillman ever communicated with Kaufman. There are those essential gaps in the argument that Mr. Kostelanetz now offers, and for him to say that there is evidence that this so-called Chicago gang that he refers to had underworld contacts, and in Newark it was Zwillman, and that connected him with Kaufman, is to overlook completely the fact that there has been no proof that Buchalter or anybody else ever did communicate with Zwillman or that at that time Zwillman ever knew Kaufman. That is the vice of the argument. It jumps those wide open gaps.

The Court: All he said so far, as I understand it is that the contact of the so-called outfit in Chicago was Zwillman in Newark. That is all I heard him say.

Mr. Wegman: That is right, and my point is that there is no proof that Zwillman was the contact man. There is simply the statement of Bioff on the witness stand, not corroborated by Browne, that Buchalter says he would see Zwillman, but there is no proof that any of the Chicago people knew him, and there is no proof that Buchalter ever did see Zwillman.

The Court: I understand the evidence is that Buchalter made this statement in the presence of the people who are charged with the conspiracy here.

Mr. Wegman: That is right, but there was nothing to connect that with Kaufman.

The Court: I will permit counsel to proceed. What the evidence is the jury will determine.

Mr. Wegman: I respectfully except.

Now you also remember the house at Riverside where this notorious Lepke Buchalter was instructed to contact Lucky Luciano to see that Local 306 voted for Browne, and Lepke saying, Oh, I will take care of that, you don't have to contact Lucky, I will take care of 306, I will handle Sherman. And then this is at page 150: "I will also see Kaufman of Jersey, I will see Longie, and see to it that Longie delivers Kaufman." Now that is the identification of Longie Zwillman on the record, and you can form your own opinion and conclusion who Longie Zwillman is.

Now it is perfectly obvious that Kaufman had a guilty conscience about these transactions, and there are three ways that you can tell that independent of the trans-

actions themselves. He threatened prospective witnesses in that speech that he made at the union meeting.

It is a fact that in Kaufman's case there are certain things that are absolutely clear, that are absolutely uncontradicted and unchallenged and undisputed. That is that a Chicago mob together with certain officers of the IA controlled labor in the motion picture industry; that the Chicago mob had some connection with a man named Longie Zwillman. Despite objections of counsel here I must perhaps remind you that Longie Zwillman is not on trial here. Kaufman is. It may be reasonably inferred by you just what kind of a character Longie Zwillman is in New Jersey. There is evidence that Kaufman was Zwillman's henchman.

I say to you ladies and gentlemen that as far as Kaufman is concerned the status of this case at present is exactly and precisely the same as the status that was enjoyed by Bioff and Browne two years ago. I submit that as far as Kaufman is concerned you have the opportunity to pass on Kaufman and you have an opportunity to have another jury some months from now pass on Kaufman's higher-ups, in the same way as you have had an opportunity to review the higher-ups behind Bioff and Browne. I say to you it is perfectly clear in this record that Longie Zwillman is to Kaufman what Compagna was to Bioff and Browne. And you cannot reach people of that type unless you have people of the type of Bioff and Browne testifying.

R. 3658. The audacity of this argument should shock this court. How can it be said that it is within permissible limits or that it did not prejudice the defense?

In view of Warner's and Keough's knowledge of Bioff, I think Bioff's relatively innocuous statement of "I am coming over to see you" has as much meaning as if Al Capone said equally innocuously, "Come and take a little ride in my car."

R. 3664. Here again the prosecutor furnishes his personal opinion. Warner and Keough were not shown to have a knowledge of Bioff which included Capone at the time of the payments. The fear suggested here by the prosecutor is not charged in the indictment; fear of bodily harm or death.

And then one day this mob decided to give Charley Gioe something to play with, and they decided to kidnap the actors' union for him.

R. 3682. The actors union transaction had no place in the record and it was unfair to use the word kidnaping.

Did he get the story out of his head, or is it the most obvious answer that his clients gave him the information?

It is unfair for a prosecutor to claim that a lawyer must have gotten information from his client as a basis for questions asked in the trial of an accomplice witness.

It is apparent these defendants made Bioff account for every penny he received and made him account not only for the dollars and cents involved but for the exact methods that he used in obtaining the money. The testimony is uncontradicted that Bioff turned over the money to DeLucia, to Compagna, to Circella and to Gioe.

A great weakness in the case of the prosecution was that Bioff never said that he told Compagna or any defendant how he got the money.

They thought up a new and ingenious answer "We, Phil D'Andrea and Francis Maritote, we are fixers, and we fix anything you have. We fix the police, we fix the Mayor, anyone." That is the contention of the defense of Maritote and of D'Andrea in this case.

R. 3684. The fact that the truth of the matter put the defendant D'Andrea in a bad light as a fixer in a local matter should not have been used by the prosecutor in such manner as an appeal to prejudice. There was no basis for his claim that this was new.

Before we proceed to the Barger situation, let us take a look at Phil D'Andrea and Frank Diamond again. Bioff identified D'Andrea as a man for whom he worked from 1922 to 1930 in various illicit enterprises, as he worked for Rio and Circella, and it was during that very time that Bioff was convicted, and in that conviction back there—in 1925 when Bioff needed a phony legitimate occupation to apply for life insurance, he gave Mr. D'Andrea's brickyard, and you can take it for what it may be, and he gave D'Andrea's company as the so-called employer, and that he, Bioff, was the general manager of that brickyard.

R. 3685. The fraud committed by Bioff on the life insurance company in 1925 should not have been used against D'Andrea in this trial. This appeal to prejudice on the subject of pandering here repeated should alone demonstrate the unfairness of the prosecutor.

Bioff has known Frank Diamond since he has known D'Andrea, and you will remember again how Diamond was appointed to be one of the muscle men, so to speak, at that 1934 convention, and actually attended it at the

direction of Nitti, and as Browne testified as well, and his presence there was corroborated by Dr. Papp and also by the witness Olson, who testified that at the instruction of Browne, and with money given to him by Browne, Olson paid for the hotel bills of this coterie that came down from Chicago to make sure that everything went right.

If Barger had any questions as to who Diamond was those questions were easily resolved when he saw Diamond at Ralph Capone's house. That is in the testimony.

R. 3688. According to the prosecutor, it was a crime to visit a home of a relative of Capone. Barger didn't pay because of the character of the man who picked up the money on the theory of the government. Bioff applied the pressure.

Again, if I may use this vernacular that we have become so accustomed to in the course of this trial, that we have become educated in it, I would say that it would appear that Rosselli was as handy with a couple of grand, so to speak, as our friend Kaufman and his associates were handy with a gun.

R. 3692. This slur is based entirely upon the testimony of a defense witness who saw Rosselli in possession of some money at the time Rosselli contributed to a charity. No connection with the case was shown.

Now the next thing that happens is that we find our friend Rosselli a house guest, or dinner guest, at Al Capone's. I think I am stating the obvious when I say that we legitimate people, folks like you, folks like me,

do not wind up at Al Capone's house as house guests right in the middle of the national shakedown.

R. 3693. This is repeated over and over again. It should not have been allowed in evidence at all and surely the visit was not a circumstance in the case to prove guilt.

It is perfectly obvious that Rosselli knew what was taking place and whatever the relationship between him and Pat Casey was, and I think the relationship spells equally just another kind of a shakedown.

R. 3695. Here the prosecutor testifies again as to his opinion. This is not very becoming when it is observed that Casey was in the employ of the movie producers and available to the prosecutor, although not called as a witness. There is no basis in the evidence for the opinion of the prosecutor upon which this accusation could be made as against Rosselli.

You first remember Gioe in 1934 when Browne was driven out by Pierce to see Rio, when Rio appeared with Bioff at the Carleton Hotel. Then Gioe for some unexplained reason disappears until 1936; in the Summer of 1936 he attends the convention with Nitti in Kansas City.

* * * It was Gioe who was supposed to be the beneficiary of the unsuccessful kidnapping of the Actors' Union. * * *

The Court: I think the use of the word "kidnapping" is rather rhetorical. I do not know whether the evidence quite justifies it. I will leave that to the jury.

R. 3700. The prosecutor was away out of bounds and the court should have known that there was nothing to leave to the jury.

Summation by Government.

* * * and the testimony is uncontradicted that it was Korshak who told Bioff to prepare that phony defense at the prior trial, and you have heard all about that defense. * * *

This was stricken when the prosecutor failed to connect Bioff's testimony to any defendant.

I think this, that the testimony of Gioe concerning his attempts to stifle and to corrupt this investigation that grew to this indictment and to this trial is technically known among lawyers as consciousness of guilt, and thus evidence of guilt itself, and that is a very common sense proposition. If a transaction is open, if it is above board, there is no reason as Gioe did to get people to testify falsely, to frame defenses, to tell people to run away and hide. On the other hand, if a man has a guilty consciousness, if he knows the transactions are not above board, he will lie about it and he will tell other people to lie. That is what lawyers call the consciousness of guilt.

I do not think it is necessary for me to run through in any detail the story of Browne, or how he was taken, how he was kidnaped in this case, how these defendants, DeLucia and Compagna, how they issued the orders. That is all over the case and runs all through the case. * * *

R. 3702. We submit that the use of the word "kidnaped" was not rhetorical and that it was unjustifiable.

You will even recall how these people slipped from time to time, and you have seen the records in here where Bioff through Isadore Zevin opened an account for a member of DeLucia's family.

R. 3702. When the court ruled that this evidence was not admissible, the prosecutor succeeded in putting it in for a limited purpose (R. 314, Vol. I). It really has no

value, but observe the manner in which the prosecutor twists things and makes use of evidence for a different reason after it is in.

Well, Bioff and Browne, they were under instructions from the outfit, from the boys, communicated by Korshak, and you have seen his mysterious hotel bills with the telephone calls, and confirmed later by DeLucia and Gioe direct. The instructions were to see that Bioff got the money from the industry and gave it to Joe Schenck to build up a fund to fight legislation. According to Korshak they got that idea from studying the record in the Schenck income tax case.

R. 3704. The fact that this evidence was stricken did not deter the prosecutor from its use.

Again I say this to you, that you have the opportunity by your verdict to tell the victims of all racketeering that they can come forward, that they can safely come forward, and then can complain to law enforcement authorities, and that swift and that certain retribution will follow from juries, whoever these racketeers may be.

Personally, I hope this is not the end of a long road for me, which has extended some four years now, when this case really started.

Without the conviction of Bioff and Browne and Circella these defendants would never be on trial before you, and I look forward to the day when, with your assistance, or I should say when your verdict will make it possible, a situation when one of these defendants will sit on the witness stand just like Bioff and Browne did——

Mr. Eben: I object. That is obviously an improper argument, and I ask that counsel be cautioned with reference to it.

Mr. Kostelanetz: I did not finish my sentence.

Mr. Simandl: This is the second time this same argument is being made, and I say to the Court the first time I let it go by in the interest of what I might say was trying to keep calm. I think it is a deliberate unfair argument.

The Court: I think we might better confine our argument to the present and let the future take care of itself.

Mr. Kostelanetz: Well, I will do that, your Honor. I was just stating my views in the situation.

R. 3710. A mere statement of this argument should show that it is not within permissible limits, it was unfair and prejudicial. The remark of the judge only added fuel to the flame.

On the other hand, as I know that for the purposes of the trial, you are really the voice of the people to protect the public that you represent, to protect the people like yourself and myself, who occasionally go to the movies and who send their children to the movies, and that is the point of view which I am sure you will take and that I am most interested in having you take in considering this case.

This is an appeal to passion based upon the illegal testimony relative to bombings and danger to movie theaters. No such charge was embraced in the indictment. Even if the defendants were guilty, there is no proof that they damaged any theater or interfered with any children, not

to say anything of the prosecutor's children or the children of the jurors. This surely was not within permissible limits.

In submitting this case to you, as far as the Government is concerned, I am sure by your verdict you will serve notice to racketeers, to mobsters, to racketeering labor leaders like Louis Kaufman and to all similar gentry, that they have got to get out of American industry and American labor and that if there is any effort on their part to extend their racketeering activities to those fields, that those activities will be met by swift and by certain prosecution and punishment.

R. 3711. It is apparent that the prosecutor made use of the Act to police the internal affairs of the union.

CHARGE OF THE TRIAL COURT TO THE JURY.

The bold face type here is part of the charge set in this manner to point up the errors.

The Italics contain our comments.

The Court: Ladies and gentlemen, we are about at the end of a long road and I think I would be remiss in my duty if I did not extend my thanks personally and the thanks of the Court to you for your diligent service during the last two and a half months, and for your patience and close attention to the evidence which has been given in the case. I think, too, that I should also express my thanks to these eminent gentlemen who have tried the case, for the courteous manner in which they have acted towards me and for their obvious effort to do their best for their clients.

I had intended to discuss at considerable length the evidence in the case, but after working on the charge last night I concluded that I would not trespass upon your patience any longer, so that by reason of my reformation I may have saved you more than an hour and perhaps two hours of more conversation upon subjects which have been adequately discussed before you. I hope to make my charge as brief as possible and to discuss practically only questions of law.

You will pardon me if I read my charge, because this is an important case and everything that I say is being taken down, and if I make mistakes they can be reviewed upon an appeal if an appeal is taken or is necessary, and if I make error, it may come back.

R. 3712. This coupled with a repetition in a little different language, really amounts to a directed verdict of guilty. The jury knew, of course, that a not guilty verdict could not be reviewed.

Charge of the Court

On March 18, 1943, the defendants were indicted by the Grand Jury of this Court, the indictment alleging that between June 18, 1934, and the date of the indictment, they, with George E. Browne, William Bioff, Nick Circella, and others unknown, unlawfully conspired and agreed together to obtain, and to attempt to obtain, by the use of and attempt to use, and threat to use, force, violence and coercion, upwards of $1,000,000 from Loew's, Paramount Pictures, Twentieth Century-Fox, Warner Bros. Pictures and others engaged in the production, distribution and exhibition of motion pictures, between the several states of the Union, and with foreign nations. It is also alleged in the indictment that Browne and Bioff, Circella and the defendant Kaufman were connected in an official capacity with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators—the I.A.T.S.E.—Kaufman being the business agent of Local 244 in Newark. It is also alleged that the defendants, with other persons unknown, would dominate, control and direct the operations of the I.A.T.S.E. and would obtain the moneys mentioned from the moving picture industry to prevent or dissuade the defendants and their confederates from obstructing the production, distribution and exhibition of motion pictures throughout the United States, and otherwise injuring the business, the moneys so obtained or sought to be obtained being for the personal use and profit of the defendants and not for services rendered.

The statute under which the indictment is laid became a law on June 18, 1934, when the conspiracy is said to have commenced, and is known as the Anti-Racketeering Act. Insofar as it is material here, it provides that any person who conspires or acts concertedly with any other person or persons in connection with or relation to any act in any way or in any degree affecting interstate com-

merce, to obtain, or attempt to obtain, by the use of, or attempt to use, or threats to use, force, violence or coercion, the payment of money or other valuable considerations or to obtain the property of another with his consent induced by wrongful use of force or fear, shall be guilty of a felony.

R. 3713. The exception in the Act was not deemed material by the court.

It is charged here that that law has been violated, and it is your and my duty to endeavor to determine whether that charge is true. While our duty is joint, still it has two domains in which each of us acts. It is your obligation to receive the law from me, as it is my duty to endeavor correctly to explain it to you. That is my domain.

I think it is important that I emphasize that, because, as I have already told you, if I make a mistake in telling you what the law is, my mistake can be reviewed. If you think you know the law better than I do and you attempt to apply such law as you think that law to be in your jury room, nobody knows what law you applied. It cannot be reviewed, and if you make an error it can never be talked about or changed or corrected.

R. 3714. After we demonstrated to the Circuit Court that the judge had made grave mistakes, that court should have reversed. The trial court not only erred in a discussion of the matter of review, but as it turned out, he created a false hope. Naturally the jury would have relied upon the judge for the law, but here they were asked to hope that the Circuit Court would perceive any error and grant relief.

Your domain has the determination of the facts, that is, the determination of what the evidence shows the

facts to be. You are solely responsible for that. Your recollection controls as to what the evidence is. **My statement of those facts is not binding upon you, if it disagrees in any respect with your recollection.** And, similarly, statements of counsel are not evidence, nor are they binding upon you. **You are the sole judges of the facts and your recollection controls in the event that it disagrees with mine or with that of counsel.**

R. 3714. Recollection of the facts in this case was not near as important as the inferences to be drawn from them on vital issues.

You will at once see that you are an important branch in the administration of justice. You have a two-fold obligation, to assist in the enforcement of the law and to protect the innocent. The government wants no innocent man convicted, but on the other hand, it strongly urges upon every trier of facts that no guilty person escape. It is most important in a government such as ours that its laws be enforced, not only for the maintenance of the government, but also for the protection of each of us in our security, property and safety. On the other hand, there is no dearer right belonging to all of us than to be protected in our liberty if we have done nothing to deserve its curtailment. **Your obligation then is just as strongly present in the protection of the innocent as it is under those statutes which the government has seen fit to enact with reference to this particular situation.**

R. 3715. The court told the jury over and over again that the Act was designed to punish these defendants.

In your determination, you are not to be guided or governed in any way by passion, prejudice, public

opinion or sympathy. Both the public and the defendants have the right to demand that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give each your conscientious judgment.

The guilt of each defendant must be separately considered by the jury and separately determined. No defendant may be found guilty unless each and every juror is convinced beyond a reasonable doubt that such defendant actually participated in the conspiracy charged in the indictment with a view towards furthering its objects.

But if you decide that the defendants or any of them are shown beyond a reasonable doubt by the facts to be guilty, such defendant or defendants cannot for any reason of sympathy, or for any reason of what his punishment may be, be absolved from the consequences of his act or from the consequences which follow the violation of the law.

Of course, you are not to suffer yourselves to be prejudiced against any defendant because of the fact that he is charged with this offense, nor to convict him for fear that crime may go unpunished, or for the purpose of deterring others in the commission of like offenses. You must not convict a defendant unless every fact necessary to establish his guilt has been proven to you beyond a reasonable doubt.

There are some general observations which I wish to make and which seem generally to have been made in cases involving the prosecution of crime.

As I have already told you earlier in the trial, the finding of the indictment is no evidence that the same or any part thereof is true. It is no more than a charge

notifying the defendants that the government claims they have violated the particular statute mentioned in it.

The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you must not permit that fact to weigh in the slightest degree against him, nor should this fact enter into your discussions or deliberations in any manner.

The defendants are at all times presumed to be innocent and such presumption remains with them from the beginning of the trial and prevails until overcome by evidence which satisfies you beyond a reasonable doubt of their guilt.

R. 3716. The correct rule requires that the presumption continue on into the deliberations of the jury (Dodson v. United States, 23 Fed. (2), 401; People v. Ambach, 247 Ill. 451). A correct instruction was refused (No. 24, R. 3735).

You must, of course, bear in mind that when I speak of innocence or of circumstances susceptible of the hypothesis of being innocent, I use the word innocence as referring to the particular and specific crime charged in the indictment and not to morals or wrongdoing generally.

The government is required to prove each essential part of the offense charged beyond a reasonable doubt. A reasonable doubt is one based on reason which can be supported by argument and discussion, one for which you can give a reason if called upon to do so. It is not an arbitrary or capricious doubt. Neither is it one born of a natural reluctance which most people have to perform a difficult or unpleasant task or as an excuse for failing to convict if the evidence justifies a conviction.

It is, of course, not necessary for the government to prove the guilt of the defendants or any of them beyond any possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. The reason for this is that it is practically impossible for one to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough if the defendant's guilt be established beyond a reasonable doubt, not beyond any possible doubt.

You are instructed, of course, that a defendant is not obliged to prove that he is innocent of the charges made against him. On the contrary, the burden of proving his guilt beyond a reasonable doubt is upon the government and remains with the government throughout the trial. And if the government has failed to satisfy you beyond a reasonable doubt that any defendant is guilty, you must acquit such defendant. And the burden of proving guilt beyond a reasonable doubt applies to each and every essential element which is a part of the offense charged and which elements I shall call to your attention shortly.

If you find that any witness for either side has wilfully testified falsely to a material fact, you may disregard the entire testimony of such witness. You are not required to do this. You may accept so much of such witness's testimony as you consider truthful and disregard the balance. In this connection I instruct you to disregard the testimony of the witness Roach in its entirety.

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment and thus places upon the government the bur-

den of proving such defendant's guilt beyond a reasonable doubt.

Some of the facts claimed to have been proven are based upon circumstantial evidence. Circumstantial evidence is that evidence which tends to prove a fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which it is sought to establish. Such circumstantial evidence is entirely proper and legal and can be made the basis of your verdict. This kind of evidence, however, to warrant a conviction must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by such defendant; or in other words, the facts proved must be entirely consistent with and point to his guilt only, and must be inconsistent with his innocence. If the evidence upon any essential element of the case, or upon the whole case is as consistent with the innocence of any defendant as with guilt, it is insufficient to warrant a conviction of such defendant.

If during the course of my charge, I shall make, or if at any time during the trial of this case, I have made any statement of opinion or of fact in favor of one side or the other, or if I have made, or may make, any statement as to what the evidence shows which disagrees with your recollection, you are not bound to accept my opinion or my version of the evidence. Nor, as a matter of fact, are you bound to accept the opinion or version of the evidence of any of the counsel in the case. When I say that, I do not mean to discredit anybody. I say it because I wish to emphasize that you are the sole judges of the facts, and your recollection as to what the evidence is will control over any statements which may be made or may have been made by the court or by counsel. In the

last analysis, the responsibility is yours to decide the questions of fact and to render your verdict accordingly.

Evidence that was stricken out during the trial should not be considered by you as having any bearing upon the result.

At times evidence has been admitted as against one defendant and not as against the others. That evidence should be considered only as against the defendant or defendants with respect to whom it was admitted.

If any evidence has been admitted and afterwards stricken out, you must disregard the matter stricken out, if any counsel has intimated by questions which the court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inferences based upon them. If counsel upon either side have made any statements in your presence concerning the facts in the case, those statements are not evidence unless they are proven and you must look entirely to the proof in ascertaining what the facts are. Of course, a stipulation or agreement between counsel as to a certain fact is proof of that fact.

During the course of the trial I have made certain rulings upon motions and upon objections. My rulings are not to be taken by you as any indication of the guilt or innocence of any defendant. Counsel have the right to object to the introduction into evidence of any testimony or exhibit offered by the opposing party. My rulings, therefore, are upon matters of law with which you have no concern and should not influence you in the slightest degree.

The question of the credibility of witnesses and the weight to be given to their testimony is peculiarly a matter within your province, and entirely for your determina-

tion. You are not bound to give the same weight to the testimony of each witness but should give the testimony of every witness such weight as you think it is fairly entitled to receive. You may take into account the appearance upon the stand of the respective witnesses, their apparent candor or lack of candor, their demonstrations, if any, of prejudice or bias, their intelligence, their means of information, their accuracy of recollection, their contradictions, what they are seeking to accomplish, and the reasonableness and probability of the testimony that each one gives.

Comment has been made by counsel with reference to irregularities in the book entries of the moving picture organizations and the secreting by them of the payments to Browne, and Bioff, and the possible reason for them. They are, of course, matters to be considered by you upon the subject of credibility of the witnesses and the nature of the transactions referred to, and the other matters to which your attention has been called. Of course, no one likes the idea of books not properly reflecting the conditions of a corporation, but you must remember at the same time that the officers of the corporations are not on trial for falsifying books, if those entries were, as a matter of fact, false or improper. The defendants here are on trial for a definite offense against the moving picture industry, and the law, and the only thing that you have to consider as respects these other witnesses is as to whether they told the truth when they gave the testimony that they did give upon the trial. We are not trying Nicholas Schenck, Austin Keough, or the Warner Brothers, or anyone else but the defendants here on trial. Whatever you may think of the moving picture business as a whole, or particular moving picture producers, has noth-

ing to do whatsoever with the question as to whether these defendants are or are not guilty, except insofar as you think that the testimony of such witnesses as have testified is not entitled to full weight and consideration, and whether other inferences may be drawn contrary to or irreconcilable with their statements.

Of course, William Bioff and George E. Browne are accomplices and co-conspirators. Much has been said in the summations as to these two men who have been convicted for the very same crime with which the defendants are now charged, and whom, it is charged, were conspirators with them. You will, of course, consider all that has been said upon that subject, but in federal courts there is nothing which forbids the conviction of a defendant upon the uncorroborated testimony of an accomplice or co-conspirator. The testimony of an accomplice or co-conspirator is not to be rejected unless you think it has no weight. Like any other fact, it is to be taken up and dealt with by you. If accomplices could not be used, there are many cases where there may be real guilt and where conviction would not be obtainable. Accomplices, therefore, are used, and properly used, and their evidence is properly to be considered by the jury. Compare it with all the facts and circumstances surrounding the transactions, to the end that you may satisfy your minds and consciences whether they have testified to the truth or not. Testimony of accomplices should be considered very carefully and should be scrutinized with the utmost circumspection. Their testimony, of course, should not be rejected if it is believed, if it sustains the contention of the government, if there are facts and circumstances from which it can be plainly perceived by you that these men, criminals though they may be, and participants in

this crime though they may be, nevertheless, have told the truth.

The statute under which this indictment is laid is said to have been passed by Congress in an endeavor to eliminate terroristic activities of professional gangsters.

R. 3721. This follows what was said in 315 U. S. 521, as to the legislative history of the Act, a subject which was of no concern of the jury.

It is obvious that under it there are certain essentials which must be proven by the government beyond a reasonable doubt.

1. **It must be shown that the conspiracy mentioned occurred in connection with or in relation to an act in some degree affecting interstate commerce, or an article or commodity moving in such commerce; and that the defendants, or such of them, if any, as you may find to be guilty, knew that the purpose of the conspiracy was to affect interstate commerce and not merely the exhibition of motion pictures. But in this connection, you may consider that if the motion picture industry was engaged in interstate commerce and that the defendants, or such of them as you may find to be guilty, knew that one of the objects of the conspiracy was to extort money from such industry, and that the natural effect of such extortion would be to affect interstate commerce, that would be sufficient.**

R. 3721. This is the same erroneous position taken by the Circuit Court which runs counter to Schecter

Poultry Co. v. *United States, 295 U. S. 495, and Mutual Film Co.* v. *Industrial Com., 236 U. S. 230 (see also R. 3731).*

2. There must have been a conspiracy between the defendants, or some of them, and Browne, Bioff and Circella, to obtain, or attempt to obtain, by use of or attempt to use, force, violence or coercion, **the payment of money from the moving picture industry, or to obtain from the moving picture industry such money, with the consent of the firms, persons and corporations engaged in that industry, induced by the wrongful use of force or fear.**

R. 3722. It will be noticed that the moving picture industry is regarded as a unity including the exhibition of films.

And that such of the defendants as you may find to have been parties to such conspiracy became such parties intentionally and with knowledge of the purposes of such conspiracy, and for the purpose of furthering its aims and objects; and when I say intentionally and knowingly, I mean that they became such parties with bad purposes, without justifiable excuse, and without grounds for believing such purposes and conspiracy to be lawful.

The word "knowingly" in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware that he cannot lawfully do the act with which he is charged; facts and circumstances which, if followed up, would lead to such knowledge as would put a man of ordinary prudence or exercising ordinary care on his guard. Guilty knowledge may be established by proof of circumstances which would induce belief in a reasonable mind that the

undertaking upon which he was about to engage was unlawful.

Let us take up each requisite separately. It does not seem to me that there is any contradiction as to the first one, that is, that whatever was done was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce. Nothing was said about it in the summations, as I remember, and I presume there is no question about it remaining in the case under the undisputed evidence.

R. 3722. The Court was in error in stating that nothing had been said about this in summation (R. 3378, 3398, 3503, 3504 Vol. IV). Here the court applied the literal meaning of the Act and took the question of interstate commerce from the jury. (See also R. 3721.)

The second requisite is that there must be shown to have been a conspiracy to obtain or to attempt to obtain money or property from the moving picture industry, by the use, or attempted or threatened, use, of force, violence or coercion. That must be found by you as an independent fact as it is the very basis of this indictment.

R. 3722. All through the charge the court regards the industry as a unity as did the Circuit Court.

A conspiracy is said to be proven when there exists a combination of two or more persons by concerted action to do an unlawful thing. The common design is the essence of the charge. It is not necessary, to establish a conspiracy, to prove that two or more persons met together and entered into a formal and explicit agreement or understanding, or that they directly, or by words or in

writing, said what the unlawful scheme was to be, or the general understanding or detail of the plan, or the means by which such unlawful combination was to be made effective. If they intentionally work together for a common purpose, and that purpose is the illegal act charged as their object, and if the acts of the parties so dovetail and fit together that the conclusion is inevitable that there was an understanding between them as to the thing to be done as charged, it would establish a conspiracy. It would not be necessary that each of the parties take part in all of the acts involved, or profit evenly, or that he participate in every detail of their execution. It is not necessary that all should be parties to the conspiracy from the beginning. If the parties act together to accomplish something unlawful and it is obvious that they are acting pursuant to some agreement, express or implied, a conspiracy is shown, even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not previously have associated together. One defendant may know but one other member of the conspiracy. But if knowing that others have combined to violate the law, and such party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

It is enough that such person connected himself with the criminal conspiracy, even though he was unaware of its full extent.

R. 3723. The vice of this abstract proposition is that one could not be guilty without knowledge of that which gives the federal court jurisdiction, i. e., interstate commerce.

It makes no difference, however, whether one of the conspirators plays a subordinate part in the unlawful agreement at a remote distance from the others. Some members in every conspiracy play minor parts, sometimes because they have not the intellect nor the boldness to conceive, nor the mental ability to execute the criminal venture, but, nevertheless, they may be parties to a conspiracy, and guilty.

If one later becomes a party to the conspiracy with knowledge of its purpose, he may be presumed to have adopted whatever may have preceded his joining. Where several parties are proved knowingly to have combined together for the same illegal purpose, any act done by one of the parties in furtherance of the concerted plan, and with reference to the common object, is the act of all of the parties, no matter when, during the existence of the conspiracy, it is done. It is not even necessary that each individual conspirator be fully informed concerning the scope of the conspiracy. Knowledge may be a matter of inference from the facts proved.

As I have said, the conspiracy constitutes the offense charged here and it must be made to appear from the evidence beyond a reasonable doubt before any defendant can be convicted, that he was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to and within a period of three years prior to March 13, 1943, the date when the indictment was found. Before the acts or declarations of an alleged co-conspirator may be considered in evidence against a defendant, you must find that a conspiracy existed, that such defendant at the time of the acts and declarations charged against him was a member of said conspiracy, that the acts and declarations of an alleged co-conspirator which were given in evidence was a member of said

conspiracy, and that such acts and statements were in furtherance of the conspiracy charged in the indictment. Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy, without agreement to cooperate to accomplish such object, or purpose, is not enough to constitute one a party to a conspiracy; it is necessary to prove that he actively participated in the conspiracy charged.

Declarations made by one conspirator to another are not alone sufficient to establish a connection of another defendant with the conspiracy.

R. 3725. Such hearsay was in fact made use of by the prosecutor. The court should have made it clear that such testimony alone, or in combination could not be used to establish connection (Glasser v. U. S., 315 U. S. 60; Nibbelink v. U. S. (C.C.A. 6) 66 Fed. (2) 178, 179).

Even if you find that Bioff obtained money from the motion picture industry by extortion, and that he was associated with the defendants, or some of them shared in such money, that would not be sufficient to warrant a conviction unless you also find that there was a conspiracy among the defendants for the purpose of extorting money from the moving picture industry, and that such defendant was a party to that agreement with knowledge of its object and also for the purpose of furthering its aims.

It is not necessary that the government prove the existence of the conspiracy by direct proof of a formal understanding or agreement. From the nature of the case usually such proof is impossible. Conspiracies are not formed in that way. Conspirators do not go out upon the public highways and proclaim their intention. They accomplish

their purpose by dark and sinister methods and must be judged by their acts. Such a conspiracy, therefore, may be proved by circumstantial evidence and you may infer its existence, under the rules that I have given you, from all of the facts and circumstances of the case presented by the evidence. **Among these facts and circumstances it may be said that the acts and proceedings of the defendants or any of them, as proven beyond a reasonable doubt, showing that they were knowingly acting in concert for the accomplishment of a common purpose, or particular end—here it is charged their individual profit—may be considered by you as proof of the existence of a conspiracy in violation of law.**

R. 3725. The objective of individual profit was made controlling by the court instead of the intent required by the act. The individual profit of Bioff, Browne, Compagna and DeLucia could not be disputed, yet more important questions were ignored.

The third requisite makes it necessary, in order to convict any of the defendants, that it be shown beyond a reasonable doubt that such defendant was intentionally and knowingly a party to the alleged conspiracy for the purpose of furthering its objects. Mere acquaintance or association with the other parties to the conspiracy or some of them or the mere receipt of money, or mere suspicion, is not sufficient. When I use the word "knowingly" that necessarily carries with it the implication that the entry into the conspiracy must have been intentional. Intent is, therefore, an element of the offense charged, and it must be established by the same degree of proof as any of the other elements that enter into the completed offense. You must consider in this con-

nection all of the facts disclosed in the evidence. You must take into consideration the conduct of the parties with relation to the matter charged, and every circumstance which bears upon the issue, having in mind that a man is presumed to intend the natural consequence of his act, intentionally or knowingly done. You will determine what the intention of each individual defendant was from your consideration of all their acts and statements, their relation to each other, the object to be attained, the things that were done, the circumstances under which they were done, and the motives which in your mind prompted the various acts so far as is disclosed by the evidence.

It must be shown beyond reasonable doubt, that the conspiracy was intentionally formed by the defendants, or some of them, for the purpose of obtaining or attempting to extort the payment of money or other valuable considerations, from persons or corporations engaged in interstate commerce in the production, distribution, or exhibition of motion pictures, by the use of or attempt to use or threat to use force, violence or coercion.

R. 3726. Here again the court regards the exhibition of pictures as interstate commerce.

In this connection, it is not necessary that it be shown that they were successful in obtaining money. The forming of the conspiracy or agreement to attempt to so obtain such money by force, violence or coercion, constitutes the crime, and whether they were successful or unsuccessful would, therefore, make no difference. However, in this case, there is ample proof that money was obtained, and one of the questions involved, is whether or not it was obtained by extortion.

Charge of the Court.

Much has been said during the summation with reference to the contention that the moneys which Bioff and Browne obtained were bribes rather than moneys obtained by extortion. The contention is important for the reason that these defendants have been indicted for criminally entering into a conspiracy to extort or to attempt to extort money from the motion picture industry by threats and fear. That is the only crime with which they are charged, and that is the only crime of which they may be found guilty, if the evidence justifies it. If you find that the conspiracy was to commit the crime of bribery and that is all they conspired to do, or if the evidence fails to convince you beyond a reasonable doubt that the agreement and conspiracy was to extort money from the moving picture industry, you must acquit.

The two crimes of extortion and bribery can be distinguished. Extortion is defined in the very statute under which this indictment was laid as being the obtaining or attempting to obtain by the use of or the attempt to use, or threat to use, force, violence or coercion, the payment of money or other valuable considerations; or obtaining the property of another with his consent induced by the wrongful use of force or fear. A much similar definition is found in the Penal Law of the State of New York, which defines extortion as to the obtaining of property of a corporation with the consent of an officer, agent, or employee thereof, induced by a wrongful use of force or fear; and the fear which will constitute extortion may be induced by an oral threat to do unlawful injury to the property of the corporation.

Bribery is defined in some of the United States laws as the giving or offering to give or causing to be given any money, property or value of any kind to an official

of the government to influence his action, vote, opinion or decision. Under the New York State law, which, of course, does not govern this particular question, but is mentioned solely for the purpose of definition, bribery is defined in substantially the same manner as in the United States statute, and insofar as a labor official is concerned, it makes it a misdemeanor for a person to give or offer to give any money or other thing of value to a duly appointed representative of a labor organization, with intent to influence him with respect to any of his acts, decisions or other duties as such representative, or to prevent or cause a strike by the employees of any person or corporation. Under both statutes not only he who gives the bribe but also the one who receives it commits a crime.

Bribery is an offense against public justice which is defined as the voluntary giving of anything of value to influence another in the discharge of his duties, or to incline him to act contrary to known rules of honesty and integrity, to pervert his judgment or corrupt his actions by some gift or promise. In that case, the payment is voluntary.

On the other hand, the obtaining or attempting to obtain money, or other valuable considerations by the use, force, violence or coercion, connotes an involuntary payment. To make such a payment involuntary, there must be some actual or threatened exercise of power possessed or believed to be possessed **(here the power to call a strike or to close theatres or to prevent the exhibition of a moving picture)** by the person acting or receiving the payment over the person or property of the one who makes the payment.

R. 3728. There can be no mistake as to the purpose of

the trial court to apply the Act to a labor official in the use of his power to strike in a local matter. This has the approval of the Circuit Court and is contrary to the law as declared in this court.

The distinction between the two crimes would seem to boil down to this—bribery connotes a voluntary payment; extortion a forced or coerced payment.

In determining here whether or not the money paid **by the motion picture industry or some part thereof** was paid as the result of fear, or was paid as a bribe, you, of course, will take into consideration all of the facts and circumstances proven in the case, the manner in which the payments were demanded, promised or made, the concealment, if any, that was resorted to in the books or otherwise, and the action or inaction of all the parties with reference thereto, and the reason which was behind the demand or the threat or the payment.

R. 3729. There can be no doubt that the court regarded the exhibition as a part of the industry, and a part which engaged in interstate commerce.

If you have a reasonable doubt whether the money paid by the persons named in the indictment as victims were paid as bribes, or as the result of extortion, that is, involuntarily, you are instructed that you must not consider such evidence as having any tendency whatsoever to prove the existence of the conspiracy pleaded in the indictment.

But you must not lose sight of the fact that the crime charged is a conspiracy to extort. And I have defined what conspiracy means—an agreement entered into knowingly by the defendants. If they did so conspire in the

manner I have charged, they can be found guilty of the crime charged, and it does not make any difference whether bribes were also accepted or whether they also conspired to accept bribes. In other words, if they did conspire to extort, and that has been proven by the evidence beyond a reasonable doubt, they may be found guilty under this indictment, no matter what else they did. The evidence, therefore, of the manner in which the money was obtained from the motion picture industry has value as some proof of what they agreed to do. It has been said, and I think it good common sense, that sometimes the best way to prove what has been agreed upon is to see and learn what the parties to the alleged agreement did under it. So the manner in which the money was obtained here may well be considered by you as indicative of what the agreement was, what they or any of them, if any, conspired to do.

If there is proof beyond a reasonable doubt that any of the money obtained from the motion picture industry was obtained by extortion, no matter how much or how little, no matter whether from one or more of the motion picture companies, and that money was obtained as a result of a conspiracy among the defendants to extort the same, the crime charged is proven and the defendants, or such of them who you may find were parties knowingly and intentionally to that conspiracy and acted in furtherance of it, may and should be found guilty.

R. 3730. Here again the court regarded the industry as a unity.

If you find that the evidence does not sustain the charge beyond a reasonable doubt, they or such of the defendants as you may find have not been so proven, must be acquitted.

One act of extortion in the manner I have described would be sufficient proof of guilt, assuming, of course that you find there was a conspiracy.

R. 3730. The "manner described" includes Barger who operated a burlesque theater and did nothing but a local business. The "manner described" also ignored the exception in the Act.

And if you find that some of the money obtained by the defendants was bribe money, and other money was extorted as a result of such a conspiracy to extort, the fact that both crimes were committed would not acquit the defendants, or such of them whom you may find were participants in the conspiracy, and acted in furtherance of it, of guilt under the indictment now before you.

As I told you before, I had intended reviewing the facts generally, but inasmuch as three days have been consumed by counsel in a careful and detailed argument of them, I feel that a further discussion would be much too lengthy and do little more than repeat what you have already been told, and what you doubtless remember anyway. Should occasion require, in your discussion in the jury room, you may have portions of the record read to you.

As I have said, all questions of fact are for your decision and they are left with you for that purpose.

For the same reason I will not discuss the contentions of any party.

All of these matters have so recently been reviewed that I hesitate longer to trespass upon your patience. I feel, however, that there should be a short discussion of the facts with reference to the defense of the statute

of limitations which has been raised here by the defendants.

The law provides that no person shall be prosecuted, tried and punished for the offense charged in this indictment, unless the indictment is found within three years after such offense shall have been committed. The three year limitation as it relates to a case like the present, which is one involving an alleged continuous conspiracy, does not commence to run until the conspiracy has been completed by its successful conclusion, by abandonment, or as to some particular defendant by his withdrawal from the conspiracy. **The reason seems to be that if the conspiracy may continue, it would seem necessary to follow that the relation of the conspirators to it must continue. If each conspirator was the agent of the others at the time the conspiracy was brought to life, or if he subsequently became a party to the conspiracy and acted in furtherance of it during its lifetime, he would remain an agent during all of the time that the conspiracy continued.**

R. 3731. This left absolutely no room for anyone to ever withdraw, or to quit.

A conspiracy, of course, is not completed when the agreement is made.

This should have been left for the jury to decide. The mere conclusion of the pleader that here we have a continuing conspiracy should not suffice. The jury might have reasonably concluded from Bioff's testimony, that he made a new deal each year.

Necessarily, a conspiracy such as is charged here, contemplates further acts or that the results of a successful conspiracy endure to a much later date. So the three

year statute of limitations does not become effective until the conspiracy has ended. Such an agreement which is declared by statute to be unlawful may be likened to a partnership agreement. Under such a situation the partnership does not begin and end with the making of the agreement, but continues either to a definite date mentioned in the agreement or until the partners have agreed to terminate it or have disagreed. So a conspiracy agreement such as the one here in question, which it is alleged, involving the obtaining of money from the moving picture industry, continues until it is abandoned or is terminated. This situation would apply to the contention made by any or all of the defendants upon this particular subject.

R. 3731, 32. This is an argument for the prosecution. It was not "necessarily" a conspiracy of such nature. That should have been a question for jury. Under this rule there could be no statute of limitations as to anyone.

Contention is also made in behalf of the defendants Maritote, Rosselli and Kaufman, that the evidence shows, if any of them can be said to have been a party to the conspiracy charged, that he withdrew from it or ceased his connection with it more than three years before the indictment was found on March 18, 1943.

Whether or not any of the defendants that I have named withdrew from this particular conspiracy prior to March 18, 1940, which is three years before the indictment was found, is a question for your determination upon the evidence. **If it is once shown that each of these defendants was a member of the conspiracy, his continued connection therewith until it was ended may be presumed by the jury. Such defendant must overcome that infer-**

ence. He may do so by proving that he ceased to participate, or he may prove that he has publicly disavowed any further connection with the conspirators. Even in the face of such proof, you may still find that his participation did not end. It has been aptly said by a capable judge, that assuming that several men entered into a conspiracy and one becomes disgusted with its progress, or because of the failure of benefits, or for any other reason, and desires to withdraw, the law says he may withdraw but that does not mean that he can stand idly by and become a kind of neutral observer. He must take some affirmative step which is inconsistent with his former participation. He must do something to arrest the progress of the conspiracy in which he has participated in order that the partnership, into which he entered and from which he claims to have withdrawn, can no longer constitute an agency of which he is a part. Having joined in the unlawful scheme, having constituted agents for its performance, the scheme and agency to be continuous until full fruition can be secured, until such defendant claiming to have withdrawn does some act to disavow or defeat the purpose, he is in no position to claim a withdrawal or the delay of the law; as the offense has not been terminated or accomplished, he is still offending. As he has started, or assisted in starting, or assisted in the continuation of evil forces into action, he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw he is still offending.

R. 3732, 33. This is contrary to the rule which should have been applied here as in Buhler v. *U. S., 33 Fed. (2) 399, holding that the withdrawal could be shown by circumstances.*

The question then presented here for your determination upon this branch of the case is whether or not there is any proof that either of the defendants has by any act, statement or otherwise done something affirmative to disavow his connection with the conspiracy, or to defeat its purpose.

If the proof shows that he has by his conduct done something inconsistent with his continuing adherence more than three years before the 18th day of March, 1943, then you must acquit him. If there is no such proof upon this subject of the case, your decision must be against him.

R. 3733. This requires affirmative conduct and eliminates the reasonable inference to be drawn from the evidence that some of the minor characters just quit. For instance, certain persons allowed themselves to be used as dummies on the payroll. Would the law require them to do more than they did after they were fired?

You will perceive that the deadline under this three years statute was March 18, 1940, that being three years before the finding of the indictment in which we are interested. If you find that a conspiracy existed, and it ended before March 18, 1940, or if you find that nothing was done under it after March 18, 1940, then, of course, you must acquit all of the defendants. If, on the contrary, however, you find that the conspiracy continued after March 18, 1940, and acts were done or proceedings were had which were contemplated by the conspiracy as originally entered into, then the defendants would have no defense under this statute.

R. 3733. Applied to this case along with the other instructions, this means that the originators could meet in

Riverside and draw up an agreement of which others were ignorant concerning its full extent, and if the originators kept on going, no one who was ever in the conspiracy could get out or be benefited by the statute of limitations.

Now, the government claims that there is no evidence that any defendant actively withdrew from the conspiracy. It contends that there is ample proof in the evidence that the conspiracy continued at least until May of 1942, and that the acts which were done in furtherance of the conspiracy, as shown by the proof, amply bear out its contention. In other words, it contends that a number of things were done after March 18, 1940, namely, that Bioff collected $10,000 from Coston on March 21, 1940, that Circella collected $11,000 from Coston on December 20, 1940, that Kaufman collected $2500 from Jacocks on August 15, 1940, that the payments to Rosselli continued until May, 1941; that George Browne delivered five-sixths of $28,000 to the defendant Paul DeLucia in the summer of 1940; that the defendant Compagna told Bioff in the Bridewell Prison while he was incarcerated there in 1940 that if he attempted to resign he would do so feet first; that D'Andrea received payments from Barger until May 7, 1942; that in the fall of 1942 D'Andrea demanded $2,000 plus $600 a month from Barger; that John P. Smith paid the defendant DeLucia as late as March, 1942; and some other matters to which the government counsel called your attention during his summation.

R. 3733, 34. Here the court adopted the argument made by the prosecutor and failed to consider that said in defense. The court might just as well have told the jury that if Bioff did anything within three years, no defendant could claim the benefit of the statute.

On the part of the defendant Maritote, my recollection of his contention is that he did nothing, received nothing, and had no part in the transactions after some time, long before three years prior to March 18, 1943. And as to the defendants Rosselli and Kaufman, both contend, of course, that they had no part in this conspiracy at all, and they both said that their actions were such as to be inconsistent with any joining or any part in the conspiracy long prior to these three years that I have already mentioned to you. You will consider all the evidence upon that subject and make your determination upon this particular question as you think it should be made.

And finally, we do not have to decide whether the strikes were called legally or illegally; or whether Browne had the right, without a vote to call one. There is no dispute in the evidence that he did so, legally or illegally, to the injury of the motion picture industry. With this situation in mind you will judge the nature of the transactions which followed and the probable or improbable effect upon those whose duty it was to conduct the motion picture industry.

R. 3734, 35. Here the court makes it clear again that the exception does not apply, and that he regarded the motion picture industry as a unity.

We do not have to decide whether the condition of the laboring man was benefited by these disputes or what transpired. The question for our decision is whether or not a crime has been committed in the respects in which I have already charged you.

R. 3735. The undisputed evidence was that the condition of the laboring man was benefited. "What transpired" should have had some value as evidence of the objectives

of the labor leaders. Here the state of mind of the victims was made, the only test. Everything else was excluded.

After all that has been said, there may be danger that you will be sidetracked by a lot of immaterial issues, by the effort to determine many of the things that have been suggested to you.

R. 3735. Among the issues clearly shown to have been regarded as immaterial by the court were those created by the exception in the Act itself and interstate commerce.

It will lighten your duties materially if you have in mind what these men have been indicted for, and whether the charges in that indictment have been sustained by evidence which convinces you beyond a reasonable doubt.

There is a simple question here. Was there a conspiracy between Bioff, Browne, Circella, and the defendants, or some of them, to extort or attempt to extort money from the motion picture industry? If there was not, the defendants cannot be convicted. If there was, and it continued after March 18, 1940, such of the defendants as were parties to that conspiracy and acted in furtherance of its objects are guilty and should be so found.

R. 3735. The question was a simple one only after the court eliminated a "lot of immaterial issues". Here again the "motion picture industry" is considered as the victim.

You will consider each defendant separately and render a separate verdict as to each. It is important that you agree upon the verdict. The case has taken a lot of time and in justice to all of the parties concerned, should be now completed.

I might say in conclusion, we are not here to teach any-

one a lesson, nor to decide the perennial dispute between capital and labor, nor to seek to remedy matters and things in either category that we may think need remedying. We are not interested in the future but only in the present. We are here to determine whether or not a crime has been committed. In that determination we should not be persuaded to run up side alleys as teachers, reformers, protestants, critics, partisans, sympathizers or philanthropists. We may properly leave to other tribunals or bodies what should be done to remedy the extraordinary and astounding transactions which have been revealed here. We should keep our feet solidly on the ground and determine whether, under the evidence given in this courtroom, these defendants, all or some of them, are innocent or guilty. If we do that, honestly and fairly, without sympathy or prejudice or bias, we will have complied with our oaths.

END OF CHARGE OF THE COURT.

Preliminary Request to Charge.

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2. The Court instructs the jury that you and you alone are the sole judges of the facts in this case, and it is your duty under your oaths, as jurors, to keep unto yourselves, and each of you, as jurors, this duty in arriving at your verdict in this case, and you are not to be influenced in this case, so far as the facts are concerned, by anything except the evidence and circumstances appearing in the course of the trial. The Court particularly cautions you that anything said by the Court in its instructions is said to you for the purpose only of giving you instructions as to the law in the case. If you should be under the impression, after hearing these instructions of the Court as to the law, that the Court has indicated the weight or purport of certain facts in evidence in this case, then you are not under any duty to follow the impression thus conveyed and need pay no attention thereto, unless it agrees with your own judgment from the evidence as to the facts in this case. (Charged in substance.)

24. Each defendant on trial in this case is presumed to be innocent of the crime with which he is charged. This presumption of innocence has the weight and effect of evidence in his behalf. It is your duty to approach the consideration of each fact and circumstance in evidence with that presumption in mind. It continues to operate in favor of the defendant until and unless it is overcome by such a weight of competent evidence that you are left without a reasonable doubt of his guilt. The presumption of innocence attends each defendant throughout the trial,

and throughout your deliberations after the case has been submitted to you, until you actually arrive at and agree upon a verdict. In determining your verdict you are to keep in mind that the Government at all times has the burden of overcoming this presumption by evidence, and unless it has been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond a reasonable doubt, your verdict should be not guilty. This presumption of innocence outweighs and overbalances all conjectures, innuendoes, suspicions and suppositions, and can only be overcome by proof beyond a reasonable doubt. (Charged in substance.)

41. A conspiracy cannot be established by mere suspicion, and evidence of mere relationship between the parties or association does not establish the fact of conspiracy. It is equally well established that the mere knowledge, acquiescence or approval of an act without cooperation, or agreement to cooperate, is not enough to constitute one party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design or purpose. (Charged in substance.)

42. The Court instructs the jury that before the acts and declarations of an alleged co-conspirator may be considered in evidence against a defendant, the jury must find that a conspiracy existed; secondly, that the defendant was at the time of the acts and declarations a member of said conspiracy, and third, that the alleged

co-conspirator whose acts and statements were given in evidence was a member of said conspiracy, and fourth, that such acts and statements were in furtherance of the conspiracy charged.

Mere knowledge or approval of, or acquiescence in the object and purpose of a conspiracy without agreement to cooperation to accomplish such object or purpose, as already explained, is not enough to constitute one a party to the conspiracy.

One cannot be held as a member of a conspiracy upon proof merely that he has knowledge of, or negatively acquiesced in, the crime that was about to be committed; but in order to fasten guilt upon one accused of being a co-conspirator, it is necessary to prove that he actively participated in the conspiracy charged. (Charged in substance.)

44. The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. (No.)

Additional Requests to Charge.

51. The Court instructs you, as a matter of law, that the only offense before you for consideration is the offense alleged in the indictment. The indictment charges that the defendants named in the indictment, together with George E. Browne, William Bioff and Nick Circella, and other persons unknown to the Grand Jurors, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other "to obtain and attempt to obtain by use of and attempt to use and threat to use force, violence and coercion, the payment of money," and "other valuable considerations from a group of corporations, including Loew's, Inc., Paramount Pictures, Inc. and other firms, persons and corporations whose names are to the Grand Jurors unknown", and to obtain the payment of said money and said "other valuable considerations," the same being the moneys and property of said firms, persons and corporations, with the consent of the said firms, persons and corporations induced by wrongful use of force and fear, "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce.

Now, the Court instructs you that the first fundamental question that you should determine beyond a reasonable doubt with respect to the charge is: Was, in fact, a conspiracy formed as charged in the indictment? If you answer the question in the negative, you are at the end of the question and your verdict as to all defendants should be not guilty. If, on the other hand, you answer the question in the affirmative, you should then determine separately as to each defendant, the question whether

you have been satisfied beyond a reasonable doubt that such individual defendant did actively and consciously enter into such conspiracy as charged in the indictment. If you have a reasonable doubt whether he did so join, you must find him not guilty. (Charged in substance.)

52. You are further instructed that the indictment charges that the conspiracy which I have hereinabove described to you charges that the same was "in connection and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce"; you are instructed that this allegation is a material allegation and must be established beyond a reasonable doubt from the evidence. You are further instructed that even though you believe from the evidence, beyond a reasonable doubt, that a conspiracy has been established as I have hereinabove described, you must nevertheless acquit the defendants unless you further believe beyond a reasonable doubt that said conspiracy was in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce. (Charged in substance.)

53A. In order that the Government may be said to have sustained its burden of proof as to any defendant, it must prove beyond a reasonable doubt that such defendant entered into the conspiracy and knew that the purpose of the conspiracy was to affect interstate commerce and not merely the exhibition of motion pictures. (Charged.)

Additional Requests to Charge.

53B. Unless you have been satisfied by proof beyond a reasonable doubt that the defendants entered into a conspiracy specifically to create fear by interference or threatened interference with the production and distribution of motion pictures, you must acquit the defendants. It is not sufficient if you find that there was a conspiracy, that such conspiracy contemplated the creation of fear with relation to interference with only the exhibition of motion pictures. If you believe that the defendants conspired to cause fear on the part of the alleged victims, but that such fear had to do only with the interference with the exhibition of motion pictures then you must find the defendants not guilty. (Same as 53A.)

62. A conspiracy to make money by any means whether lawful or unlawful is not the specific offense which is charged in this indictment and proof of such a conspiracy will not establish the specific charge laid in the indictment and will not be sufficient to support a verdict of guilty. (Same in substance as 59.)

63. The indictment does not charge a general conspiracy to make or obtain money from any source and without regard to the method or means employed in obtaining it, but it does charge a specific conspiracy to obtain or attempt to obtain money or things of value from certain named firms in the motion picture industry and others stated to be unknown, through unlawful acts or attempted acts of coercion. Therefore if you find that the sole conspiracy which was entered into or which existed among the defendants was a conspiracy to obtain control of the IATSE and to use such control for the

purpose of making or obtaining money by any method or means, without specifying the particular method or means, the Government has failed to sustain its burden and you would have to acquit the defendants. (Same as 59 in substance.)

70. The indictment charges a conspiracy formed within the Southern District of New York, and unless you find beyond a reasonable doubt that the specific agreement was actually entered into by these defendants within the Southern District of New York, the Government has failed to sustain its burden of proof under this indictment and the defendants must be acquitted. You are instructed that if you find that a conspiracy was in fact entered into in Chicago, Illinois, or in Riverside, a suburb of Chicago, and that all of the acts and conduct of the defendants related back and had their inception in such a conspiracy, then you must find the defendants not guilty. (No.)

71. The indictment charges a conspiracy formed and entered into within the Southern District of New York. Therefore, if you find that the proof admits only of a conspiracy existing among the defendants, or some of them, which had its beginning and was first entered into some place outside of the Southern District of New York, and that everything that was done by any of the parties thereto, within the Southern District of New York was in pursuance of and to effect the objective of the conspiracy which began and was formed some place outside of the Southern District of New York, the Government has failed to sustain its burden of proof under this indictment, and you must acquit the defendants. (No.)

Additional Requests to Charge.

72. Even if you find beyond a reasonable doubt that the conspiracy alleged in the indictment was entered into, it cannot be said as to any defendant to have been continued as to him unless you can find in the evidence an act in pursuance of said conspiracy which he committed or which was committed with his full knowledge and consent within three years prior to the filing of the indictment herein, and if you fail to find proof beyond a reasonable doubt of the commission of such an act within three years prior to the filing of this indictment, then he must be acquitted. (No.)

73. You are instructed that even if you find that the Government has proven beyond a reasonable doubt that a defendant was a member of this conspiracy at some time, that defendant must be acquitted if you also find that at some time prior to March 18, 1940, he withdrew from the conspiracy. That withdrawal from the conspiracy may be shown by conduct inconsistent with the theory of continuing adherence, and so, if the evidence has left you with a reasonable doubt whether such a defendant continued to adhere and be a party to this conspiracy, if you have found that there was such a conspiracy, after March 18, 1940, then you must find that defendant not guilty. (Charged in substance.)

4. That for any acts of violence, or threats of violence, or other illegal acts which may have been proven at this trial, other than is involved in the carrying out of any conspiracy charged in the indictment herein, the person committing the same can only be prosecuted under the statutes, Federal or State, covering the commission of

such acts. None of the defendants are on trial herein for the commission of any such acts as such, and if the jury should come to the conclusion that the evidence establishes the commission of such illegal acts by any defendant herein, it may not be considered the same against any other defendant, nor against the defendant involved except insofar as it may bear upon the question of his participation in any conspiracy charge in the indictment, if such conspiracy has been established, or insofar as it may be evidence of the existence of such a conspiracy. (No.)

9. The requirements of the law are not satisfied by proof that the defendants received money, either directly or indirectly, from the corporations specifically named in the indictment. Mere proof of the receipt of money is not sufficient to warrant the conviction of the defendants. It is the law, and I so charge you that you must acquit the defendants unless you find beyond a reasonable doubt that the corporations named in the indictment paid money to the alleged conspirators by virtue of force and fear and that the defendants received the money in pursuance of a conspiracy to obtain money and other valuable considerations by the use and attempt to use force, violence and coercion from the corporations named in the indictment. (No.)

16. If you have a reasonable doubt as to whether the payments made to the defendants, that is provided that you find they were made, were made for the purpose of influencing Bioff and Browne, who were representatives of a labor organization, in respect to any of their acts,

decisions or other duties as such representatives, or to induce them to prevent or cause a strike, it is your duty to acquit the defendants. (No.)

18. I charge you that the question of the existence of the conspiracy as charged in the indictment, must be found by each of you as an independent fact. (Charged.)

20. I charge you that it is your duty to acquit the defendants unless you are convinced beyond a reasonable doubt that they conspired to interfere with interstate commerce. I further charge you that you must acquit unless you are convinced beyond a reasonable doubt that the interference was direct and substantial. (No.)

22. I charge you that Browne and Bioff, according to their testimony, are accomplices of the defendants. This does not mean that you are to conclude that the defendants confederated and conspired with Bioff and Browne. It merely means that in considering the testimony of Bioff and Browne you must bear in mind the fact that they admitted they were the accomplices of the defendants and that you must consider their testimony in that light. Although the law does not ordinarily require that the testimony of accomplices be corroborated, I charge you that you may not convict the defendants upon the testimony of Bioff and Browne unless they be corroborated by such other evidence as tends to connect the defendants with the commission of the crime. The evidence required is insufficient if it tends only to establish the credibility of Bioff and Browne. The corroborative evidence, to have any value, must be evidence from

an independent source of some material fact tending to show that the defendants were implicated in the crime. The independent evidence must be material evidence other than that of Bioff and Browne, and must fairly and reasonably tend to connect the defendants with the crime charged. It may not depend for its weight and probative value upon the testimony of the accomplices. It need not alone and by itself establish that the defendants committed the crime. But where the corroborative evidence standing alone has no real tendency to connect the defendants with the commission of the crime, it is insufficient, and therefore you must acquit the defendants. (No.)

Supplemental to General Request to Charge.

The defendant Louis Kaufman respectfully requests the Court to charge as follows:

II. In the order in which the testimony was offered, the first item touching Kaufman has to do with the conversations at the house in Riverside, Illinois, some time in May, 1934, shortly before the convention of the IATSE which was held in Louisville, Kentucky, the first week in June, 1934. Bioff testified that in connection with talk of New Jersey, Kaufman's name was mentioned. Browne, on the other hand, testified that he did not recall any mention at all of New Jersey. In any event, you must completely disregard Bioff's testimony about that, and you must not permit it to have the slightest weight in your deliberations, in determining whether Kaufman has been connected with this conspiracy. Kaufman was not present at the meeting in the Riverside house; there was not a scintilla of evidence that he was associated with anyone who was there, or that he authorized anyone to speak for him there; there is not a scintilla of evidence that anything that was said there was communicated to him or approved by him. It is the law that any conversation which was had in his absence and without his knowledge and approval, at a time when he was not shown to be a member of the conspiracy charged in the indictment, cannot be considered as having any probative value whatever to connect him with the conspiracy. It is your sworn duty to erase that testimony from your mind, and you must not permit it in any way

to color your consideration of the question, in deciding whether Kaufman has been connected with the conspiracy. (No.)

III. The next item of testimony touching Kaufman has to do with the alleged delivery to him on October 27, 1936 of $15,000 by Jacocks, Morgenroth and Flaherty, who at that time were employed in the Newark office of Warner Bros. (No.)

You will bear in mind that there has been no testimony whatsoever that Kaufman demanded or even asked for this money. It has been affirmatively shown that Kaufman never threatened to strike, nor did he make any threats of any kind. Furthermore, there is no proof to show that said moneys were paid involuntarily by Warner Bros. or as the result of any fear or coercion. Of the witnesses whose testimony touched this payment, Flaherty said only that he had put the case in various theatre safes for safe-keeping overnight from October 27 when it was brought over to Newark to October 28 when it was turned over to Kaufman. Jacocks and Morgenroth testified that on one occasion Kaufman had said he had to take the money "over the river' and at another time he said he had "given the money to Bioff."

Bioff, however, testified that he never received any of this money and had had no money dealings whatsoever with Kaufman. He flatly declared that Kaufman was never his partner. (No.)

IV. The mere fact that Kaufman may have received $15,000.00 under the circumstances indicated by the testimony with respect to this incident does not of itself

establish that he knew of the existence of the alleged conspiracy and intentionally and knowingly participated therein. (No.)

X. On the other hand, if you believe the testimony offered by the Government concerning the payment of $2500.00 in 1939 and $2500.00 in 1940 you must also consider this further specific point in respect to Kaufman. Even if you had concluded that the evidence showed beyond a reasonable doubt that Kaufman was connected with the conspiracy when he received the $15,000.00 payment on or about October 28, 1936, if his actions in 1939 and 1940 were directed to the obtaining of money for himself, independently of the conspiracy, you must consider whether this conduct on his part was inconsistent with his continuing adherence to the alleged conspiracy. If you find that what he said and did in 1939 as testified to by Jacocks and Morgenroth was inconsistent with continuing adherence on his part to the alleged conspiracy, amounting to a withdrawal from the conspiracy, then you must return a verdict of not guilty as to Kaufman because it would then appear that he had withdrawn from the conspiracy more than three years prior to the filing of this indictment and prosecution of him would therefore be barred by the statute of limitations. (Leave to the jury under the law as I have charged.)

XI. There has been testimony here that at a meeting of the members of Local 244 on January 13, 1942, Kaufman is alleged to have stated to those present substantially as follows: "There are some people who would like to see me in jail, but I am not going to jail. I will be here long after they are dead, and they won't die a

natural death." The uncontradicted proof is that whatever was said by Kaufman at that meeting was with respect to a matter entirely foreign to this prosecution, and had no reference whatsoever to anything involved in this case. You must therefore entirely disregard the testimony concerning any such statement by Kaufman as having any tendency whatsoever to establish his alleged connection with this alleged conspiracy. (No.)

XIV. There has been mention in the testimony of an individual named Zwillman. It affirmatively appears from the proof that the name and identity of Zwillman was known to the Grand Jury which returned this indictment, and that all that was testified to at this trial in respect of Zwillman was also known to the Grand Jury at the time of the finding and presentation of this indictment. Therefore, as a matter of law, you cannot consider that Zwillman was connected with this conspiracy, and it is no part of the charge against Kaufman that he did anything at all in relation to or in connection with Zwillman, and you must not consider any such alleged acts as in any way connecting Kaufman with the charge laid against him by this indictment. (No.)

Supplemental Request on Behalf of Kaufman.

The argument of the prosecution that a defendant should be convicted, because it might afford the means for the prosecution of others, or justify the continuance of the Special Assistant Attorney General in office, is highly improper and must be entirely disregarded by you, in your deliberations.

Supplemental Requests to Charge on Behalf of Defendant John Rosselli.

Supplemental Requests of Defendant John Rosselli.

1. You are instructed that you must find the defendant, John Rosselli, not guilty unless you find, beyond a reasonable doubt, that the evidence establishes a conspiracy, as charged in the indictment, existed within a period of three years prior to the return of the indictment herein, to wit: March 13th, 1943, and that he knowingly and intentionally was a party to such conspiracy. (Charged as to all defendants.)

3. Testimony has been given that the defendant, John Rosselli, received some of the proceeds of certain IATSE weekly salary checks from September, 1936, to November, 1937. You are instructed that you may not consider this testimony in determining whether or not said defendant was a party to the conspiracy charged in the indictment. Said testimony may only be considered by you, if you believe, beyond a reasonable doubt, that said defendant did so receive the proceeds of said weekly checks, as showing association with the alleged confederate Bioff and persons in an official capacity with said labor union, and in connection with the allegation that it was the purpose of the defendants and their confederates to dominate and control said labor union. (No.)

OPINION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR.

Our comments have been interspersed in bold face type.

L. HAND, *Circuit Judge:*

Compagna and six others have appealed from convictions for violation of subdivision (d) of § 420(a), Title 18, U. S. Code:

The indictment alleges that the conspiracy was in violation of (a), (b) and (d). (d) refers to (a) and (b) so it would be more accurate if the Circuit Court had either followed the indictment or have described the charge as a conspiracy to violate the Act.

a conspiracy to extort money from producers and exhibitors of moving pictures during the years 1935 to 1940. They rely upon some twenty assignments of error, of which the first and the most important is that there was not enough evidence to support the verdict.

The Circuit Court put this first, we did not. This is a misstatement of our position. We never did regard any such claim as first and most important. (Petition for Rehearing, Point Sixteen, R. 4206, fol. 4207.)

Since the case against Kaufman is somewhat different from that against the rest, we will reserve consideration of his appeal until we have disposed of those of the others.

Kaufman was and is separately represented, so we do not comment on the case as it concerns him alone.

The only other alleged errors of any consequence concern the general conduct of the trial: e.g., the admission of supposedly incompetent evidence, the judge's charge, the prose-

cutor's misconduct, and the fact that the judge spoke to the jury out of court after they had retired.

These errors should have required reversal. That which we regarded as one of the most important is here omitted, i. e., variance as to venue. (Petition for Rehearing, R. 4213, fol. 4215.)

For a discussion of the constitutionality of the statute—also an assigned error—we need only refer to *Nick* v. *United States*, 122 Fed. (2) 660 (C. C. A. 8).

The Statute was discussed and held to be constitutional in United States v. Local 807, 315 U. S. 521. The Circuit Court studiously avoids all mention of this case although it arose in the second circuit. Our case is not like the Nick case or the Teamsters case, but insofar as they conflict, and they do conflict, the Teamsters case should control. The Circuit Court declines to state our objection to the constitutionality of the statute for the reason that it prefers the authority of the Nick case to the applicable decisions of this court. If our point were stated it would then be obvious that the Circuit Court in the case at bar has construed the statute in a way to affirm this judgment which would require the further holding that the Act is not within the power of Congress. We object to a literal use of the words in the Act as to interstate commerce which makes the Act reach a strike on a moving picture theater.

To an intelligent understanding of the appeal, it is necessary to give an outline of the general venture in which the accused were involved, as the jury might have found it from the testimony. The fabric of this was woven out of the testimony of two accomplices—Bioff and Browne; particularly that of Bioff, a man with a long, discreditable and criminal past, confessedly guilty of perjury in an earlier examination of the same transactions here in question. Their

story was in substance as follows. Browne had been a member and business agent for the Chicago local of an international trade union of stage hands and moving picture machine operators, which covered the United States and Canada. In 1932 he ran for president of the union and was defeated. Shortly thereafter he met Bioff, who already knew the accused and others of their kind and had engaged in illicit operations with them. The record does not definitely disclose the nature of the original association of these two men, but a jury might find it too to have been illicit.

If there is anything definite and complete in the record, it is a narration in every detail of the original association of Bioff and Browne. How they met, what they did at first and how their association grew (R. 100 to 944, Vol. I, R. 1014 to 1326, Vol. II). A correct understanding of the undisputed facts about this original relationship, before it is claimed your petitions were involved, would have been helpful to the defense. Particularly in demonstrating that Barger's troubles had no place in this record.

In any event, they made more money than they had been used to having and spent it freely enough to attract the attention of one, Circella, who kept a night club in Chicago, and who was one of a group or gang, of confederates who lived by blackmail.

There is not the slightest foundation in the record upon which to find that Circella was one of a blackmail gang. Circella is named in this indictment and was convicted with Bioff and Browne. How Circella lived is not shown, except that the prosecutor, without proper proof, designated Circella and denounced your petitioners as members of the Capone gang. It is notorious that Capone was a bootlegger. Membership in his gang was an easy matter to charge, but not so easy to prove.

The cupidity of these men became aroused by this news;

and, after preliminaries unnecessary to detail, they forced upon Browne and Bioff an agreement by which they should receive, first one half and, later two thirds of all that the two might collect from moving picture exhibitors.

It would be more accurate to say that Rio told Bioff of their demands for a share in any money he made, no matter how he made it. Exhibitors were not discussed when the partnership was formed. The object of the agreement was proved by what Bioff and Browne did to get the money. Among other things they took a large part of the union treasury and turned over a share. Undisputed evidence, contrary to the theory of the prosecution, was ignored in both courts below.

Among the confederates were, not only the appellants here, but a number of others—among them, Circella, already mentioned. The first step was to elect Browne president of the union, in which they succeeded.

Browne had no opposition and there is no proof that the defendants had anything to do with his success. The Circuit Court adopts this premise from the opening statement, comments and argument of the prosecutor which furnishes the only basis for the finding. The importance of correcting such a misstatement is that the prosecutor first made this inference without basis then he built another inference upon that, and so on. In a case based upon circumstantial evidence, it is important to note that the prosecutor not only failed to prove his first step but that the uncontradicted evidence is contrary to his position.

Circella and Bioff were then given offices in the union as personal representatives of Browne, as president, and both drew salaries. Early in 1935 all had been arranged, and Bioff and Browne, who were to be the spearheads, began to blackmail exhibitors of moving pictures in Chicago.

The uncontradicted evidence shows that Malloy, who

preceded Browne in power, was accepting money from the exhibitors for years in return for his betrayal of the union. This was the two men in a booth labor controversy. Your petitioners had nothing to do with this, neither did Bioff or Browne. After the death of Malloy, Browne as International President took control of the Chicago union under the by-laws. Bioff and Browne merely continued the arrangement made by Malloy. The exhibitors paid money in preference to hiring more men. It is important that the undisputed evidence be correctly understood here and that it not be misstated.

So far as appears, they did not expressly threaten violence, but confined themselves to a pretence of union activities; that is, they threatened to call strikes against their victims unless they were plentifully paid. Among their earliest victims was an exhibitor in Chicago, one Barger, who operated a small theatre, and whom Bioff forced to share equally with him all Barger's profits.

Barger formed a partnership with Browne long before the defendants were heard of, whereby Browne used the union to help Barger stifle competition. This appears from his own testimony (R. 2110-2196, Vol. III). Then it appears that he was arrested for indecent shows and sought the influence of politicians. He said that he merely contributed to local politicians as a matter of policy. The Circuit Court weaves Barger in as if he were connected with the charge made in the indictment. The original pressure on Barger came from Browne who was an official of the stagehands union. This was before Browne met Bioff. Barger paid Browne in return for Browne's agreement to require competitors to use more stagehands.

Later, by the same pressure, Bioff imposed upon this unfortunate man as employees: first, Maritote, and later, D'Andrea, neither of whom rendered any services what-

ever, but who were paid $175 a week and later $200. By the autumn of 1935 the enterprise had apparently become so profitable that Bioff extended it to New York. One, Basson, was the local agent of the New York local, and had undertaken negotiations for a wage increase with some large exhibitors in that city, with the threat of a strike as a sanction; but Bioff, speaking for Browne, without whose consent no strike was regular, intervened and upon the payment of $150,000 from the exhibitors collectively, refused to permit the strike.

This misleading statement of conclusions will help to demonstrate the vice of the state of mind testimony. It is just as reasonable to find from the undisputed testimony that Basson was afraid of a strike, whether it was legally called or illegally called. He could have acceded to the demands of the union and had no fear and no strike. This was a legitimate wage demand by Basson of a legitimate union. How could the courts below say that the exception in the Act could be properly ignored? It is fair to say that the employers found it cheaper to pay the $150,000 than to meet the union demands for a wage increase.

We contend that it was a question for the jury to determine, from all of the facts and circumstances in evidence, why Basson paid; if he had any fear at all, or was coerced at all. The jury should not have considered what Basson said he had on his mind, years after the event.

Until the beginning of 1936, the collections had all been from exhibitors, either in Chicago or New York, but early in that year the group decided to include producers, who, as is well known, produce films for the most part in California.

Bioff didn't put this construction on the affair when he made his demand upon Schenck. According to Bioff, he told

Schenck that the big producers had saved a lot of money after the defeat of the union on the west coast, and that they wanted some of that money back. Here again a correct understanding of the undisputed facts will be helpful. The Circuit Court has put the cart before the horse and has found connections which do not exist. The money obtained in Chicago was negligible and obtained without reference to any national hookup. After the IATSE lost the Hollywood strike, they were down to a few members and the moguls ignored the union. Other unions took in their members and Browne was helpless. We quote from the record (209):

> "The Witness Bioff: The accomplishment was that Mr. Otterson asked me to open the theaters on a promise that he would do everything in his power to see to it that the IATSE retained its jurisdiction and they would correct the mistake that they made."

This was followed by a meeting in New York of which Browne reported to Bioff as follows (R. 210):

> "The Witness Bioff: The Report was that we were getting back all of our jurisdiction and that we will have a closed shop there too."

By this maneuver, the union acquired six or seven thousand men (R. 211). No money was requested or paid. The IATSE was taken in under the basic agreement.

If it be correctly understood, from the undisputed facts, that the pressure which produced the large sums of money from the victims named started in this manner, it will be seen clearly that Barger was not in the picture at all.

It had been the custom of the industry to have an annual meeting each year in New York between representatives of the various unions in the industry and of the producers; and in 1936 Bioff went to this meeting and met Schenck, a representative of a large producer. Bioff threatened to close up the theatres of exhibitors throughout the

country unless Schenck could raise a very large sum from the producers generally.

Schenck took pains to explain that he conveyed the message to the other executives and that they were free to pay or have labor trouble.

After some higgling, the two finally agreed upon a schedule, or tariff, by which the larger producers were each to pay annually $50,000; and the smaller, $25,000. The group found the threat of a strike against the theatres more effective a sanction than a strike against the producers themselves; for, by stopping the outlets they could entirely paralyze the production of films.

In the absence of the record, an incorrect impression might be gained here of the undisputed facts. Before Browne discovered that the producers could not stand a strike on the Chicago theaters, he was helpless as to any strike on the producers. They ignored Browne and his puny union. The first thing Browne did after he found them vulnerable to a Chicago strike was to put his men back to work in Hollywood and to build up the union. It was after the IATSE was strengthened that Bioff took advantage of their power, and the fear of labor trouble on the part of the producers to obtain money.

The arrangement so concluded lasted almost until the indictment was filed on March 18, 1943, and resulted in the collection of over $600,000, in addition to nearly $500,000 collected from exhibitors.

The evidence connected all the accused now at bar with this undertaking, although for the most part this was through the testimony of Bioff, corroborated in some degree by Browne. As is so often the case in criminal appeals, we are asked to reverse the conviction because the testimony

on which the verdict was based, was incredible; as always, we reply that that question is not for us, but for the jury.

This is not a correct statement of our position (Petition for Rehearing, R. 4207, fol. 4208). We did our best to prevent this reply which the Circuit Court could be expected to make every time the credibility of witnesses is discussed. The government attorneys know very well that we conceded, for the purpose of our appeal, the truth of every scrap of testimony produced from whatever source. We believed that it was important that we not be sidetracked or have our real points confused.

If, viewing the situation as a whole, they chose to believe Bioff, their conclusion was final. Coming to the individuals separately, nothing need be said about Compagna; Bioff connected him with the venture in the most direct way; apparently he was the chief. To deLucia Bioff repeatedly paid part of the blackmail; and, on occasion, he did the same to Gioe, though not so often. Circella introduced Rosselli to Bioff as the representative of the group in California; Bioff arranged to pay him a part of the money extracted from the producers in that state, though the payments were disguised by bookkeeping designed to hide the nature of the transaction. As we have already said, Maritote and D'Andrea were given sinecures in the business of Barger, at weekly payments of from $175 to $200. It was impossible to doubt—nothing being shown to the contrary—that men, receiving such payments in such a way, were privies to the scheme.

Contrary conclusions are just as reasonable from the undisputed evidence. There was no evidence at all of a direct connection as to any of your petitioners with any act charged in the indictment.

They could not have supposed that they were bona fide employees of Barger; nor is it tenable to assume that a ruth-

less and grasping crew of blackmailers would provide soft berths for subordinates who were ignorant of the general nature of the undertaking of which they were the beneficiaries.

They never supposed they were or claimed that they were employees. Their claim was that Barger sought local police favor and protection by paying them. The Circuit Court assumes that the benefit came from the national conspiracy. It is more reasonable, from the evidence, to hold that D'Andrea knew nothing of the betrayal of the International Union by Bioff. A child in D'Andrea's place would not have accepted checks in payment, if he had possessed any such knowledge. We don't seek to argue details, but we must point to circumstances in the undisputed proof to show that the Barger transaction was foreign to the issue.

We start therefore with the hypothesis that all of the accused now at bar were parties to a blackmailing conspiracy of wide scope, long duration, and vast returns.

"Hypothesis" is not the word for it.

It is apparent that such a conspiracy was within the statute, provided that the threats used to extort the money were "coercion," as defined in subdivision (a) of § 420(a); and provided further that the extortion was "in connection with" an act "affecting" interstate commerce. To take up the second point first, it was enough proof of the effect of their acts upon interstate commerce, that the group found it more effective, when they were blackmailing the producers, to threaten them with a strike against the theatres. Nothing could more completely illustrate the unity of the whole industry; all its parts were like those of a single elastic member in which an impact upon one part is instantly transmitted everywhere. Moreover, not only would the producers feel the check upon the interstate movements of their films

when the exhibitors were tied up; but, since many of the exhibitors did business on a small margin, and must have a constant supply of films to keep going at all, a very short cessation of that supply at the sources might destroy them, and end them forever as outlets. If these were the facts, the business was interstate as matter of law and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue.

But the judge did say something on the issue. He took the side of the government. He decided the issue as a matter of law, and decided it wrong.

Coming back now to the first of the questions we just put, the accused "coerced" exhibitors and producers, if it was "coercion" to threaten them with strikes. The statute does not, indeed, make it a crime to force a rise in wages by such a threat; the twice expressed exception that it shall not apply to the payment of wages would alone prove that, as indeed would the general purpose to be drawn from the whole.

This is correct, but is it not strange that the Teamsters case should not be cited here in view of the fact that your Honors had also put this construction on the Act.

But if the accused at bar were not concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen, but to feather their own nests, they "coerced" their victims within the meaning of the section.

This is one way to regard the evidence, but it is strained. The use of the phrase "accused at bar" denotes a switch of terms. We were talking about the labor leaders who obtained the money and exerted the coercion—they were always concerned in wage disputes. If the "accused at bar" were the only ones discussed there would be no need to con-

sider the exception at all, but they were not in a position to exert pressure, in fact, they had no dealings with the victims at all.

The judge should have left to the jury nothing more than he did.

The judge left nothing to the jury. The Circuit Court never answered the real question, and that was, did the judge have a right to refuse to instruct on the exception and to regard the Act as if the exception had never been enacted? The judge told the jury that strikes, legal or illegal, had nothing to do with the case, and that the condition of the working man, one way or another, did not matter.

The indictment having been filed on March 18, 1943, it was necessary to show that it continued until March 18, 1940, and there was evidence in plenty that it did, although several of the accused were not shown to have continued their connection with it as late as that. To meet this lapse in the evidence as to them, the prosecution invoked the well established doctrine that anyone, once shown to have been a member of a conspiracy which lasts until the beginning of the statutory period, must satisfy the jury by affirmative proof that he disconnected himself from it before that period began. So the judge charged, and he was quite right; we have so lately affirmed such a ruling, that we need only refer to the authorities on which we then relied. *United States* v. *Cohen*, 145 Fed. (2) 82, 90.

We quote from the opinion in United States v. Cohen, 145 Fed. (2) 82, written by Judge Hand:

> "The judge rightly told the jury that a confederate, once shown to have been such, had the burden of satisfying them that he had withdrawn from the enterprise."

Assuming that this is correct as an abstract proposition of

law, the Circuit Court in our case has not correctly stated that which the judge did tell the jury. He told them that no one could possibly ever get out of the conspiracy if the accomplice witness performed any act within three years. This was tantamount to an elimination of the statute of limitations because it was undisputed that Bioff did plenty within three years. The instructions are even worse than this. Please see another appendix here where we have copied them and pointed out the errors (herein p. 61).

We do not find it necessary to discuss the several alleged variances between the indictment and the proof; neither cumulatively, nor in detail, could they have misled the defence;

Whether or not the defense was misled is only part of the question. Constitutional questions of venue are involved, but the Circuit Court does not mention our point. Nor did the Circuit Court heed the manner in which the prosecutor was permitted to purposely mislead the defense.

the substance of the charge and the proof were in entire accord.

This is not true. The conspiracy was alleged to have been formed in New York and the undisputed proof showed that it had been formed in Riverside, Illinois.

All the accused and a number of others were engaged in a single enterprise, understood by all to be such: a common engagement to prey upon the fears of producers and exhibitors wherever there was a likely opening. It is curious that today in the face of §556 of Title 18, U. S. C., it should still be supposed that we would concern ourselves with the trivial challenges to the indictment which are here put forward as a ground for reversal. The same is true of most of the assigned errors, touching the judge's rulings upon evidence and his charge. With one exception which

we shall take up in a moment, these were of no importance; and would not even have been of importance, had the result been less inevitable than it was. We shall not consider the others in detail, but content ourselves merely by referring to § 391 of Title 28, U. S. C.

The U. S. C. was never intended to alter or amend the constitution. Any well informed layman would recognize the importance of the points presented by the record. Your petitioners were entitled to a statement of the constitutional questions involved them, and to an announcement of the legal grounds upon which the judges concluded in favor of the prosecution.

Two questions do arise, however, which seem to us to require an answer. After the jury had been locked up, they sent out a note, asking that Barger's testimony against D'Andrea should be read to them; and the judge, who had apparently left the court room, on his way back to it "stopped in the jury room and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we came back." The testimony was read to them after lunch, not including the cross examination, which they apparently did not want to hear. At any rate, since the accused did not ask to have it read, they are in no position to complain of the omission. As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. *Mattox* v. *United States*, 146 U. S. 140, 150; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81; *Dodge* v. *United States*, 258 Fed. Rep. 300, 303, 304 (C. C. A. 2); *Little* v. *United States*, 73 Fed. (2) 861, 864, 865 (C. C. A. 10). But, like other rules for

the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. *Dodge* v. *United States, supra* (258 Fed. Rep. 300); *Rice* v. *United States,* 35 Fed. (2) 689, 696 (C. C. A. 2); *United States* v. *Graham,* 102 Fed. (2) 436, 444 (C. C. A. 2). There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused.

The Circuit Court could find nothing in the record upon which to base a finding that no prejudice resulted. The correct rule is that in the absence of any showing one way or another, the prejudice will be presumed. Please see our brief for authorities and a review of the cases cited here by the Circuit Court (p. 80).

There remains only one question, as to the method of dealing with which my brothers and I are not in entire accord, though we agree in the result. During the trial the prosecution called a number of exhibitors or producers who testified that Bioff threatened to call strikes in their theatres or film studios, if they would not comply with his demands.

They testified as to what Bioff told them, which was proper and was as far as they should have been permitted to go.

As we have already said, he did not threaten them with violence, but the judge allowed the prosecutor to ask whether, when they paid the blackmail, they had been moved by fear of violence; and in a number of instances they said that they had.

This occurred in every instance. Every victim who took the stand gave the same improper testimony.

Moreover, they were further allowed to say what their fears had been: i.e. that during other strikes there had

been stoppages of film machines in the middle of a performance; stink bombs had been set off in the theatres; members of the audience, and recalcitrant exhibitors had been assaulted. Against all this testimony the accused vigorously protested at the time, and they particularly press its admission upon us now as error.

This improper evidence also included murders, bombings, the danger as to women and children, fears as to their own safety, their financial worries, etc. Petition for Rehearing (R. 4208).

If the indictment had charged the substantive crime of extorting money by "coercion," there would, we all think, have been no doubt of the relevancy of such testimony;

In the Teamsters case, your Honors answered this question of relevancy directly opposite to the answer given in the case at bar. Judges Hand, Clark and Swan in the same case answered the same question contrary to their present position. Yet the same judges do not mention the Teamsters case here. This failure was not an inadvertent oversight. The Teamsters case was again called to the attention of the Circuit Court in our petition for rehearing (R. 4209).

it would have been necessary in that case to prove that the "coercion" had induced the payments, as to which the victims would obviously have been the best source of information.

There is a wide difference between "source of information" and "state of mind."

They would know why they paid the money,

Even this happens to be untrue in some instances, the opinion evidence was given by persons who had nothing to do with the original transaction with Bioff and who had nothing to do with the decision to pay. They were mere errand boys as to the money.

"Why they paid the money" and what they may have had in mind are two different things.

and, the issue once open,

Who, but the trial court, ever held that the issue as to the state of mind of the victims was ever properly opened and by what authority does the Circuit Court say that the issue was open, contrary to the decision of this Court?

no prosecutor should be limited to the bare statement that the threat had been the motive; the victim would be allowed to show in detail just what fears the threat aroused in him. Since, however, the crime was a conspiracy, and not the crime of blackmail itself, we all agree that it was not necessary for the prosecution to prove that the conspiracy was successfully executed: that is, that any money had been in fact "obtained."

This question is moot. The money was paid.

My brothers think that, even so, it was relevant to show that the scheme proved successful as part of the proof that there had been a scheme at all.

This is elementary, but the proof must be in accordance with established rules of evidence. No one objected to the victims telling what they did, what they saw and what they heard, before and at the time of the payments. The scheme was to have Bioff and Browne use their position in every way possible to obtain money for themselves from any and all persons, corporations and associations, including their union. And the purpose of the victims was to operate their theaters as cheaply as possible and to pay as low a wage as would be tolerated by the men. Such conclusions can be drawn from the facts and circumstances. The circumstances should not have been colored before the jury or in the upper courts by hearsay and opinions of victims.

They believe that there is a rational connection between the existence of the criminal agreement—the "partnership in

crime"—and the fact that the acts upon which the conspirators agreed,

There is no evidence as to what "acts upon which the conspirators agreed" except as to what was said and done at the time. This should not include state of mind and hearsay.

when carried out, had the expected effect upon those against whom they were directed.

It is reasonable to conclude, from the proof, that the movie moguls were making so much money by reason of the combine they had erected, that the defendants believed that they would prefer to pay crooked officials to betray their union, rather than to pay the union men the wages demanded. The cost of wage increases to the IATSE not only added to expense of operation, but if allowed, such increases would bring similar demands from numerous other unions. It is all right to look to proper evidence for "the expected effect", but here again the evidence should not have been colored with opinion and hearsay.

They further believe that, even if this connection be not perfectly faultless in logic, the distinction is too formal and too fine drawn to be treated seriously, and that we should not strain to enlarge its importance.

To what distinction are Judge Swan and Judge Clark referring? We are unable to follow them. Do they mean the distinction between what they hold and (a) logic, (b) the facts in the case, or (c) the law of evidence.

For these reasons they believe that we should hold that it was not an error at all to admit the testimony.

Judge Swan wrote the opinion in the Greater New York Live Poultry C. of C. v. United States, 47 Fed. (2) 156, which was relied upon in the trial court by the prosecutor (R. 961). In that case the market men were properly permitted to give

their reasons for not doing business with certain victims. The case is distinguishable because the evidence was given by an actor in the conspiracy and described his conduct, verbal acts. It is difficult to understand why Judge Swan does not cite the case here, it is on the same subject. The trial court was either right or wrong in following it here. This failure, on the part of the Circuit Court to fully discuss the action of the trial court, was called to its attention on Petition for Rehearing (R. 4209).

It seems to me, on the other hand, that the only evidence relevant to the existence of a conspiracy are facts which come, or at least might have come, to the knowledge of the conspirators, among which, obviously, the undisclosed mental states of mind of the victims in the case at bar could not be.

This is a near approach to our position. It should be emphasized that "facts" are here spoken of. A state of mind four years after the event is not a fact and what the victims may have heard after the payment is not a fact. Nor is it a fact when victims tell of murders and bombings they heard of during their entire business career.

What they told Bioff of their reasons for paying him was of course relevant, for it would be part of the nexus of information with which all were charged in the prosecution of their common enterprise; it became a part of their mutual understanding.

There never was any objection to evidence of this sort. It is very meagre for the reason that some of the "victims" were mere errand boys and had not dealt with Bioff. As to Schenck upon whom the demand was first made, Bioff did all of the talking and that was very little, beyond the statement that the movie people had saved a lot of money by defeating the union on the west coast, and that they (the union) wanted that money back. Bioff did say, at one time,

that he would tie up the exhibitors. After the Chicago strike demonstrated their power, there was very little left to say. The jury had all of that evidence and it was for the jury to say: "Why" the money was paid.

But I cannot see how what they did not tell, could be relevant.

It is unfortunate that Judge Hand did not make it clear here that they "did not tell" of murders and bombings. There was no such testimony in the record outside of the hearsay. The victims and the errand boys didn't tell of the murders and bombings in this connection until after Bioff started to tell of their relations before the grand jury.

It is difficult to learn from the report of *Nick* v. *United States, supra*, 671, 672 (122 Fed. (2) 660 (C.C.A. 8)) whether that case supports my brothers' views; I, at least, am not sure whether the indictment was for the conspiracy—there clearly was one—or the substantive crime.

The Nick case included both conspiracy and the substantive crime. Also the Sherman Act.

The reasoning seems to indicate that it was for the second; yet the crime is spoken of as a conspiracy.

Judge Hand might also have observed that subsequent to the Nick case, this court considered and decided the same point to the contrary in the Teamsters case.

But, although I think that it was an error to admit the testimony, I do not believe that it requires us to reverse the convictions.

It is difficult for us to imagine any evidence which could be more harmful.

It might have done so, if the victims had based their fears upon what the accused had done in the past; but the testimony did not in this way covertly convey to the jury an accusation of earlier and independent crimes.

But the victims did say that these defendants had a murder or two to their credit. This failure on the part of Judge Hand to comprehend the record was called to his attention on Petition for Rehearing (R. 4208). In this connection please see the argument of the prosecutor, where he seized upon this evidence to condemn these defendants for bombings, murders, kidnapping and every crime on the calendar. Indeed, it did not appear that any of the accused on trial had ever called a strike in the past (Kaufman may have, but not in Chicago, where these victims did business).

This is an illogical switch of terms again. Judge Hand had been discussing Bioff. Bioff created the fears and Bioff called strikes. "The accused on trial" did not call strikes, neither did they coerce anyone, or did they obtain any money from the victims. "The accused on trial" carried on all of their dealings through Bioff and Browne. (We except Barger who paid money to D'Andrea but he gave no fear testimony against the persons on his payroll. His fear too was of Bioff.)

The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes.

The state of mind and hearsay evidence was not so limited. It included that which the producers had learned of Bioff's associates after Bioff exposed the matter before the grand jury. The hearsay evidence furnished a missing link which was seized upon by the prosecutor to make it appear that the victims paid because of their fear of the Capone gang, a desperate group of outlaws. Without the hearsay testimony the jury may have been able to try the real issue without this appeal to prejudice.

As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury.

The evidence went further than what everyone knows about strikes. There was no need to prove merely what everybody knows. A comprehension of the record will show how the prosecutor seized upon every insinuation possible to connect your petitioners with murders and bombings. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes.

The inconsistency of this with the undisputed proof is that those of your petitioners who shared the money took pains to stay out of the picture. The Chicago strike gave Bioff all the power required. He never claimed, nor did any of the victims claim, that at the time Bioff put on the pressure that he revealed that he had any associates.

We are satisfied that the accused had an impartial trial, and that no honest jury could have failed to convict them. The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence. The convictions are affirmed.

KAUFMAN'S CASE

The chief difference between Kaufman's appeal and that of the others, is in the evidence against him, a summary of which is as follows. Among the producers were Warner Brothers who, through a subsidiary, had been exhibiting films in New Jersey under a wage-scale contract with the local which expired on September 1, 1936. In August of that year the "zone manager" of Warner Brothers, Jacocks, sent his personnel manager, Morgenroth, to negotiate a new contract with a committee of the union, who were accompanied by three officers of the local, one of whom was Kaufman, the local agent of the New Jersey local. The committee dropped out during the negotiations, and early in October Warner Brothers reached an agreement with Kaufman and his two colleagues. Shortly thereafter Jacocks drew out $15,000 in cash and gave it to Morgenroth; who on the next day gave it to Kaufman. Morgenroth asked him at the time whether he had to "split" the money "with any of the other fellows"—meaning the two other officers of the local—and Kaufman answered that he did not, and that they knew "nothing about it"; but he added that he did not get a cent, because "I have to go across the river." Somewhat later Jacocks also had a talk with him in which he said "that he had to take that money over the river and turn it over, and he did not get any of it." The 1936 contract expired at the end of August, 1939; and there were again preliminary conferences between officers of the local and Warner Brothers; but this time Kaufman was alone, after the wage-scale committee had retired. He then asked for $10,000, telling Jacocks that he had had to pay to Bioff the whole $15,000 received in 1936. The parties finally agreed that he should have $5000 in two instalments which were paid in 1939 and 1940. At the time the second instalment

was paid he for the third time declared that the whole of the first payment had gone to Bioff.

Bioff's story was that Kaufman had come to him, had told him that he was having trouble in getting an increase of wages for his men from Warner Brothers, and had asked him whether he could "help." Bioff had then gone to Phelps —the "labor contact man" for Warner Brothers—who told him that Kaufman was unreasonable and threatened to strike, and that Phelps was looking to Bioff "to see to it that we get straightened out." Bioff answered that he would not let Kaufman strike, but Phelps should "get straightened out with Kaufman even if it costs some money." Bioff swore that Kaufman had never paid him any part of the money, and that when he had complained of this to Nitti, Nitti had told him to let it pass, because Kaufman was Zwillman's "man" and would arrange the matter with him. Bioff protested that this was irregular, but took no measures to force the payment. The only other testimony connecting Kaufman is that in the spring of 1934 when several of the group were discussing how to elect Browne as president of the union, one, Buchalter, had said that he would see to it that a person named Zwillman "delivers Kaufman."

If the jury believed Bioff, they could scarcely have avoided the conclusion that, when Jacocks and Morgenroth paid Kaufman $15,000 to settle the difficulties which had arisen about the new wage-scale contract, it was because Bioff had intervened with Warner Brothers on Kaufman's behalf, as Kaufman had asked him to do. It is true that the money did not go to raise wages, which was what Kaufman had said he wanted, but nevertheless Kaufman had accepted it, and there was every probability that it had been paid to avoid a break down in the negotiations, and a consequent strike. If in addition to this, Kaufman told the truth when he said that he had paid the whole amount to Bioff, no other

conclusion was possible than that he was a party to the general conspiracy. Obviously, he would not have done so, unless he expected some equivalent, either by way of profit or of immunity. There may be honor among thieves, but there is no maudlin munificence. The jury was free to disbelieve this part of Bioff's testimony and to convict Kaufman on his own declaration. On the other hand, it would make no difference, if in fact they thought that Kaufman never did pay the money to Bioff. When Kaufman said that he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself. Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it. If in fact he was as faithless to his accomplices as he had been to his local, that did not disprove that they were his accomplices as he had implied; and the jury might take him at his word.

There remain certain questions as to the competency of testimony admitted against him. In 1934 when some members of the group were discussing the election of Browne as president, as we have just said, Buchalter told them that Zwillman would see to it that Kaufman would turn the vote of the New Jersey local. This may have been inadmissible when Bioff testified to it, but we have never held, and we do not think, that the order of proof is important. As soon as it appeared from the testimony we have just set out, that Kaufman later became connected with the conspiracy, all evidence became competent against him, of whatever had been theretofore done in its execution. *Van Riper* v. *United States*, 13 Fed. (2) 961, 967 (C. C. A. 2); *Coates* v. *United States*, 59 Fed. (2) 173, 174 (C. C. A. 9); *Lefco* v. *United States*, 74 Fed. (2) 66, 68, 69 (C. C. A. 3). The declaration in question was not narrative; it was an act in furtherance of the common enterprise. Again, Bioff's talk with Nitti

about bringing Kaufman to account for the payment of $15,000, was of the same kind, except, indeed, for the added fact that it was after Kaufman was shown to have joined. Next, the testimony as to what Kaufman said at a public meeting, held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who should testify against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth. If it "prejudiced" Kaufman, that was precisely its entirely laudable purpose. Finally, Kaufman's interview with Jacocks in 1932 was also admissible. If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as such to negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration.

The supposed excesses of the prosecutor in his summing up to the jury, we have already dealt with upon an application for bail; we then said, and we now repeat, that he did not go beyond "permissible limits."

Judgment affirmed as to all the appellants.